COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, SS.

APPEALS COURT
2015-P-0616

JAMES GREEN, *Petitioner*

ON APPEAL FROM ORDER OF SINGLE JUSTICE TO STAY RELEASE FROM CUSTODY

BRIEF AND APPENDIX OF THE APPELLANT JAMES GREEN

ATTORNEY FOR APPELLANT

MICHAEL A. NAM-KRANE

BBO# 636003
PO BOX 301218
Boston, MA 02130
Phone 617.553.2366
michael@bostonjustice.net

OCTOBER 2015

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Rules

Constitutional Provisions

ISSUES PRESENTED

I. In a case where the Qualified Examiner and the Community Access Board witnesses gave evidence that was effectively cumulative and where other instructions were given, repeatedly, setting out the jury's undisputed correct role in evaluating witness testimony and exhibits, did the trial judge abuse his discretion in denying the Commonwealth's motion for new trial based on the allegedly erroneous instruction discussed in Souza,[1]

II. Whether the stay of the Petitioner's release pending appeal, after a jury verdict in his favor, should be vacated given: the trial judge's reasonable exercise of discretion in denying the Commonwealth's motion for new trial; the demonstrated weakness of the case against the Petitioner; and the ability to set conditions on the Petitioner's release pending appeal.

---

[1] Souza, *petitioner*, 87 Mass. App. Ct. 162, 172-173 (2015)

INTRODUCTION[2]

This case is a petition for discharge under G.L. c. 123A § 9. (R. 3) The Petitioner is a 57 year old man who committed sex offenses against adult women in 1991, 1997, and 2002 when he was from 23 to 44 years of age. (Ex. 21-29) During his last incarceration in 2007 the Petitioner volunteered for treatment and transfer to the Massachusetts Treatment Center (MTC). (Ex. 31) From 2007-2015 the Petitioner finished 4 of 5 core treatment classes at the MTC, using the latest treatment methodology. (March 13/17, 123-124) At his March 2015 trial three of the five experts presented, including a Qualified Examiner, opined the Petitioner was not sexually dangerous. (March 13/197, March 16/43-44, 100-101) The jury also found the Petitioner not to be sexually dangerous. (March 18/16)

The Commonwealth has appealed (2015-P-1013) the denial of its motion for new trial in which it claimed the following instruction was given in error, pursuant to Souza, supra, and the trial court's (Pierce, J.)

---

[2] The trial transcripts are cited by the 2015 trial and post trial dates and page as ([date]/[page]). The exhibit volume, filed jointly by the parties, is cited by page as (Ex.). The Record Appendix is cited as (R.). The Addendum is cited as (Add.). This brief is cited by page as (Br.).

decision not to reinstruct or to order a new trial was an abuse of discretion. The oral instruction at issue stated,[3]

> In order to find that Mr. Green is a sexually dangerous person, you must credit the opinion of Dr. Nancy Connolly who testified in her capacity as a Qualified Examiner and opined that Mr. Green is a sexually dangerous person as defined in the law at the present time. It is not required that you accept all of the reasons given by Dr. Connolly for her opinion. You might find support for the opinion anywhere in the evidence, including in the testimony of Dr. Angela Johnson the CAB representative. However, you cannot find that Mr. Green is a sexually dangerous person today unless you credit the opinion of Dr. Connolly that Mr. Green suffers from a mental condition that causes him serious difficulty in controlling his sexual impulses at the present time.

(March 17/66-67)

The Petitioner's appeal here (2015-P-0616) is from the Single Justice's order (2015-J-0133) to

---

[3]The written instruction stated, "In order to find that Mr. Green is a sexually dangerous person, you must credit the opinion of Dr. Nancy Connolly who testified in her capacity as a Qualified Examiner and opined that Mr. Green is a sexually dangerous person as defined in the law at the present time. It is not required that you accept all of the reasons given by Dr. Connolly for her opinion; you may find support for the opinion anywhere in the evidence, including in the testimony of Dr. Angela Johnson the CAB representative. However, you cannot find that Mr. Green is a sexually dangerous person today unless you credit the opinion of Dr. Connolly that Mr. Green suffers from a mental condition that causes him serious difficulty in controlling his sexual impulses at the present time." (Ex. 587)

reverse the trial court's decision to release the Petitioner pending the Commonwealth's appeal. (Add. 7) The Petitioner submits the trial court did not abuse his discretion in denying the Commonwealth's motion for new trial, given the circumstances of this case. Justice Pierce issued thorough written and oral decisions on the matter.[4] (Add. 1, April 3/21-23) The Commonwealth's appeal is unlikely to succeed and the Single Justice was mistaken to supplant the trial court's well reasoned decisions.[5] This Court, with aid of a fuller and correct record,[6] should vacate the stay of the Petitioner's release.

STATEMENT OF THE CASE

On August 8, 2011, the Petitioner requested discharge from civil commitment under G.L. c. 123A § 9. (R. 73) A jury trial began on March 11, 2015. (March 11/1) At the beginning of the trial Justice Pierce informed the parties that he would give the

---

[4] Another Justice, Justice MacLeod, agreed with Justice Pierce's decision not to reinstruct the jury. (March 18/26-29)

[5] Commonwealth v. Cohen, 456 Mass. 128, 132-133 (2010)(A Single Justice may but is not required to review a motion to stay *de novo*. She may, instead, review it for abuse of discretion.)

[6] The Commonwealth submitted exhibits to the Single Justice that had not been redacted as they had been at trial. (R.) Also the Single Justice did not have the trial transcripts.

instruction at issue. (March 11/45) The Commonwealth had filed a motion in limine opposing same (R. 11) but made no objection at that time. (March 11/45)

The Commonwealth's case consisted of two witnesses, their expert reports, and exhibits relevant to its case. (March 12/5, March 13/2, Ex. 1-399) Dr. Nancy Connolly served as a Qualified Examiner. (March 12/5) Dr. Angela Johnson represented the Community Access Board (CAB). (March 13/2) The Petitioner presented three experts: the other Qualified Examiner, Dr. Margery Gans (March 16/82); and independent examiners, Drs. Joseph Plaud and Leonard Bard.[7] (March 13/ 166, March 16/10)

At the charge conference on March 16th Justice Pierce considered the Commonwealth's motion opposing the instruction at issue. (March 16/141-142) He denied the motion. Id. After, closing arguments Justice Pierce gave a thorough instruction to the jury, including the instruction at issue. (March 17/48-80)

The next day, March 18th, Justice MacLeod sat in for Justice Pierce, who was at a training session. (March 18/6) However, Justice Pierce made himself

---

[7] The Petitioner also presented Liam Grant, a former inmate at the MTC. (March 13/148)

available by speakerphone when the Commonwealth informed him of the decision in Souza, supra, announced that day. (March 18/11-12) The Commonwealth requested the jury be reinstructed consistent with Souza, supra. (March 18/15) That request was denied. Id. That same day the jury found the Petitioner not to be sexually dangerous. (March 18/16)

At the Commonwealth's request the Petitioner's release was stayed until March 23, 2015. (R. 7)

On March 23, 2015 the Commonwealth filed a motion for new trial or in the alternative for a stay of the Petitioner's discharge, pending appeal. (R. 7) The Commonwealth's March 23rd motion claimed a new trial was necessary because the trial court had given the instruction at issue. (R. 19) On March 31st the Commonwealth told the trial court that it had contacted the Probation Service's General Counsel. (March 31/8-9) Said General Counsel informed the Commonwealth that it refused to supervise the Petitioner's release conditions. Id.

At the hearing on April 3, 2015 the Probation Service submitted a memorandum of its position. (R. 211) Justice Pierce found he could not order conditions but he still had to release the Petitioner.

(April 3/22-24) He then denied the Commonwealth's motion for new trial and ordered the Petitioner to be discharged.[8] (April 3/21-24) However, that discharge was made effective April 8, 2015 to give the Commonwealth time to seek appellate review. (April 3/24)

On April 6, 2015 the Commonwealth moved the Single Justice of this Court (2015-J-0133) to stay the Petitioner's release, pending appeal. (R. 9) On April 7, 2015 the Single Justice (Green, J.) allowed the stay. (R. 9) The Petitioner filed a notice of appeal. (R. 9, 226)

STATEMENT OF THE FACTS

A. The Petitioner's background

The Petitioner was born in 1958 (Ex. 75) in Georgia. (Ex. 16) His parents were still teenagers when he was born so he was raised by his father's parents. (Ex. 16) His parents never married. Id. His father instead married a Boston woman and when the Petitioner was 16 years old that is where he moved. Id.

---

[8] The Commonwealth filed a timely notice of appeal. (R. 53)

The Petitioner graduated from Cathedral High School in Boston. (Ex. 17) He started working when he was 13 years old. (Ex. 19) He held "many jobs and he worked for many years for his father who owned gas stations." Id. When he was 21 years old he served in the military for two years. (Ex. 19) He was "generally discharged, under honorable conditions." Id.

The Petitioner has had several romantic relationships, one for as long as four years. (Ex. 19) He never married, however he does have a daughter. Id. His sexual history does have dysfunctional elements. When he was a child he experienced sexual abuse. (Ex. 18) When he began using cocaine he enlisted prostitutes. Id. The Petitioner's romantic relationships seem to have ended when his experience with cocaine begins in the 1980's. Id. Likewise, his cocaine use coincides with the onset of his criminal convictions in the 1980's. (Ex. 19-20)

He is physically healthy. (Ex. 20) He does take Zocor for high cholesterol,[9] which is not surprising for a man his age. (Ex. 20) Notably, he has no history of mental health treatment in the community. Id.

---

[9]https://www.merck.com/product/usa/pi_circulars/z/zocor/zocor_pi.pdf (viewed September 20, 2915)

B. The Petitioner's criminal history

It is in the 1980's, when the Petitioner was in his 20's, that his criminal history begins. (Ex.11) His nonsexual convictions consist of an assault and battery in 1986; possession of cocaine and shoplifting in 1990; and four cases of breaking and entering, one in 1990, twice in 1995 and one in 1997. (Ex. 8-12)

C. The Petitioner's history of sex offense convictions

The Petitioner does not deny that he violently, sexually assaulted three women on three separate occasions. (Ex. 13-15, 17)

In 1991, the Petitioner sexually assaulted a 23-year-old female acquaintance. (Ex. 24-25) He invited the woman to his apartment to use cocaine. Id. When the victim attempted to leave, he choked and dragged the screaming victim back in to the room. Id. He locked the door to prevent others from coming to the victim's aid. Id. He punched the victim in the eye, raped her and prevented her from leaving until morning. Id.

He was convicted of indecent assault and battery and sentenced to five years in prison. (Ex. 9) Companion charges of rape and kidnapping were

dismissed and charges of assault and battery and possession of a controlled substance were guilty filed. Id. The Petitioner was released on October 2, 1993. (Ex. 22)

In June 1997, the Petitioner attacked a 41-year-old woman, as she tried to open the front door of her apartment. (Ex. 26). He dragged her down a basement stairwell where he forced the victim to perform oral sex on him, saying "'Suck it bitch or I'll kill you.'" Id. He punched the victim about the head and face and began to choke her. Id. He vaginally raped the victim. Id. The victim broke free and crawled to the courtyard of the apartment complex where he again attacked her. Id. He was "'on top of the victim with his penis out when he was dragged off the victim by neighbors.'" Id. Neighbors surrounded him and prevented him from leaving until the police arrived. Id. The victim, who was wearing a leg brace, was bleeding and suffered lacerations to her face, elbows and hands. Id

The Petitioner was charged with rape, assault to rape and assault and battery. (Ex. 8) In 1998, he was convicted of rape and assault to rape while the charge of assault and battery was guilty filed. Id. He was released on May 11, 2002. (Ex. 22)

When Dr. Connolly interviewed him about the 1997 offense, he said that he did not want to minimize what the victim had reported and he did not disagree with the police reports. (Ex. 27) However, his version of 1997 offense was that the 1997 victim, like the 1991 victim, was someone who agreed to do cocaine with him. Id. She agreed to some sex but when she refused to continue he felt entitled because of the drugs he gave her. Id. He does dispute that he attacked her or the injury he caused.

On May 31, 2002, twenty days after the Petitioner was released from his 1998 sentence, he raped a 30-year-old woman. (Ex. 22) "The victim stated that she and Mr. Green were going to Porters Pass[10] to smoke crack." (Ex. 27) The police report states

> 'They went under the railroad bridge and the suspect heard voices off in the distance so he did not want to go straight on the path. Therefore, after walking out from under the bridge, they immediately went to the left and climbed up the hill to a clearing at the top. In order to do this, they climbed over lots of debris including tires and trash. This officer would estimate that it was 20 yards to where the

---

[10] Porter Pass maybe a road that runs under a commuter rail line overpass in Brockton. https://www.google.com/maps/place/Porter+Pass,+Brockton,+MA+02301/@42.0885534,-71.0153114,800m/data=!3m1!1e3!4m2!3m1!1s0x89e484c51ffdb7d9:0x76211edc34f4dcc0?hl=en (viewed September 20, 2015)

> clearing was from after the bridge. No one else was around when they reached the clearing. Victim [name] stated there were a pail and a cement block that day when they got to the clearing and they both sat down on the cement block. The suspect asked her if she had a pipe to smoke, and she did so she began to look for it. The suspect looked as if he was going into his pocket to get the drugs and then he lunged at her throat and she fell on her back. Victim [name] stated that she felt like she could not breathe. Voices could be heard coming towards them. The victim knew it was her brother because of his whistle. The suspect told her to 'shut up' and forced her to go into the heavy brush that was about 5 yards away. The victim could remember the suspect telling her that he had and 'incredible urge' to bite her ear off. She was able to get in a few screams and the suspect started to run away'

(Ex. 28) The victim also reported,

> 'We heard rustling up by-near us, and he dragged me into the bushes by my throat. Picked me up off of my feet by my throat into more bushes, and I heard my brother's whistle, and he strangled me more and told me to be quiet, don't say nothing, and I was saying, I won't; I won't, but he was choking me and I-couldn't breathe.' She said Mr. Green was biting her. She said, 'I just screamed because he was hurting me, biting my hands, and he had previously threatened to bite my ear off, so it was scary ... He wanted to bite my ear off ... He let go of me, and he held me by my throat and he punched me after I was on the ground.'

Id.

For the 2002 offense, the Petitioner was convicted of rape and assault and battery. (Ex. 8) He was sentenced to eight years in prison. Id.

D. The plaintiff's history of sex offender treatment

The Petitioner did one year of sex offender treatment in prison before his 2002 offense. (March 12/120-121, March 13/100-101) Dr. Connolly characterized that treatment as "pretreatment" and only "introductory phases." Id. She explained that pretreatment is where one learns concepts. (March 12/121-123) It is not until core treatment that one applies concepts to themselves. Id. The Petitioner did not do core treatment until he transferred to the MTC in 2007. (March 12/115, March 13/123-124) The Petitioner's treatment is voluntary. (March 12/142-143)

The treatment modality at the MTC is a newer one than the Petitioner did before 2002. (March 12/153) It is called the "Good Lives Model." Id. The Petitioner treatment classes have been like college courses. (March 12/151) He attends each one for 10-12 weeks (i.e. almost a semester). Id. He must also go to group sessions twice a week for 3 total hours a week. (March 12/167) He must attend lectures. (March 12/151) He must participate in class discussions. Id. He must write a term paper. Id. He must take a final exam. Id.

The Petitioner has finished four of the five "pathways" in this treatment regimen. (March 13/7)

The five pathways classes are part of the Good Lives Model treatment modality. (March 13/125) This is "intense" sex offender treatment. (March 13/123-124) It is a good program, designed so men can understand the "pathways they took to offending." (March 12/125)

To pass these classes the Petitioner wrote papers and passed exams to demonstrate his understanding of: sexual self regulation; sexual interests; his sexual history; and any deviant interests. (March 13/127-128) To progress as far as he did, to pathways four, the Petitioner has shown: "mastery" of the material in the prior pathways; an understanding of his "own pathways, goals and regulation style;" and a "successful reintegration plan." (March 13/128-129)

The Petitioner is committed to treatment. (March 12/159) He is in the highest level of treatment at the MTC. (March 13/30) He has been in treatment at the MTC for around eight years. (March 12/157-158) In that time he has only missed a total of 150 days. Id. Roughly he has been out for two summers in eight years of taking college like classes.

E. The expert evaluations of the Petitioner

Qualified Examiner Dr. Nancy Connolly

Dr. Nancy Connolly was an eminently qualified expert. She has been a licenced psychologist for over 20 years. (March 12/64) She is the program director for the Department of Mental Health's (DMH) statewide program to oversee the risk management and treatment of DMH patients with sexual behavior issues. (March 12/63) At the DMH she has worked with 250 moderate to high risk sex offenders. (March 12/69) She does assessments and develops treatment for the sex offenders in DMH's care. (March 12/70-71)

Dr. Connolly worked at the MTC from 1993-1995. (March 12/64, 68) At the MTC she oversaw the Restrictive Integration Review Board (RIRB), which is now the CAB. (March 12/64) She did annual reviews, crisis intervention and court testimony when needed. (March 12/65) She evaluated 100's of men at the MTC. (March 12/72-73) She even oversaw the treatment at the MTC from 2002-2006. (March 12/76)

She has been a court clinician. (March 12/66) She is now on the legislative committee to examine

protocols to assess sex offender recidivism. (March 12/66-67)

Dr. Connolly's assessment of the Petitioner was very thorough. (March 12/73-74, Ex. 13-49) She read the Petitioner's records, including the police reports. (March 12/73-74, 85) She conducted a three hour interview with the Petitioner. (March 12/80) She used the Static-99R, a widely accepted actuarial to gauge the Petitioner's potential risk vis-à-vis the known risk of studied offenders. (March 12/128-129)

She found the Petitioner to be sexually dangerous. (March 12/187) She explained that given his criminal history he met the DSM-V diagnosis "Other Personality disorder with Antisocial traits." (March 12/100) She said this was a chronic condition. (March 12/101-102) It is a persistent disorder that makes controlling any sexual deviancy more difficult. (March 12/104) She did not diagnosis him with a mental abnormality however she believed his sex offenses exhibited "sexual arousal towards violence." (March 12/103) She also noted an alleged sexual arousal to prostitutes. (Ex. 46)

She noted the Petitioner's high (7) Static-99R score, making him a 'high risk.' (March 12/130) That

score accounted for age. (March 12/131) Clinically, Connolly discounted age as a protective factor. (March 13/55-56) She saw the Petitioner as an outlier to the statistics on age/risk because he sexually offended into his 40's. Id. In fact, she found the offense when he was in his 40's to be "predatory" and an "escalation" of his offending behavior. (March 12/99)

She noted his violation of probation and the failure to register as a sex offender. (March 13/18) She noted: the allegation that he had made a sexualized remark to another inmate (March 13/29); that people didn't want to be in his support groups (March 12/185); and his being hypercritical of other inmates. (March 13/31-32)

She did not believe the Petitioner's release plan was sufficient. (March 12/134-135) The Petitioner had Worcester as one place he may return to. Id. However, Worcester was the place of his 1991 offense. (Ex 9) As such, Connolly found that a high risk area for him to live. (March 12/135)

She acknowledged his treatment history. (March 12/157-159) However, she found the Petitioner to be only "superficially engaged" in treatment. (March 12/160) She found he could not integrate the treatment

to himself. (March 12/172-173) That is, the Petitioner would admit responsibility but his version of events did not recognize his offending against strangers or the level of violence. (March 12/91-93, 104, 113) Deviant arousal was "key" to the Petitioner's treatment. (March 12/133) She also noted that he had done treatment before in prison and that he had been in prison just before his last offense yet still offended. (March 12/120)

The "bottom line" for Dr. Connolly was the finding that he had not dealt with deviant arousal in treatment. (March 13/16) She opined his behavior was "repetitive and compulsive." (March 12/137) She concluded, "Today I think that he would not be able to control his sexual impulses." (March 12/138)

Community Access Board Member Dr. Angela Johnson

Dr. Johnson became a licensed psychologist in 2007. (March 13/66) In 2008 she became a Qualified Examiner and in 2009 she joined the CAB. (March 13/67) The CAB determines whether one is sexually dangerous using what is called "an empirically guided clinical assessment." (March 13/69) Essentially, they review the individual's history, talk to his treatment team

and sometimes they are able to talk to the individual. (March 13/70) The CAB considers what they discover

> through the lens of what is known from the empirical literature on sex offender recidivism and what factors indicate an increased risk of reoffending or perhaps, in some cases, there may be some factors that are protective and may mitigate a person's risk that they present.

Id. The CAB then takes a vote on whether or not the individual is sexually dangerous. Id.

Dr. Johnson may find a person not sexually dangerous if certain dynamic factors have improved. (March 13/71-72) She considers: the person's health; treatment insight; if the interview reveals they have integrated treatment to themselves; and whether the release plan shows sufficient support to help the individual.[11] Id.

All five members of the CAB found the Petitioner to be sexually dangerous. (March 13/79) They, like Connolly, found his history met the criteria for the chronic disorder, "Other specified personality disorder with antisocial traits."[12] (March 13/85-86)

---

[11] The Petitioner did not interview with the CAB. (March 13/74) However, Dr. Johnson said, "it's not a forgone [sic]conclusion that just because someone doesn't meet with us that we're going to say that they're dangerous." (March 13/75)

[12] Like Connolly, the CAB did not diagnosis the Petitioner with a mental abnormality.

They, like Connolly, found that his sexual offenses demonstrated compulsive behavior because: his were attacks on strangers; he was not deterred by prison; quick to reoffend; and he reoffended even after sex offender treatment. (March 13/79-80) Like Connolly, the CAB found the Petitioner had "deviant sexual interests" in violence and in prostitutes. (March 13/81-82, Ex. 123)

The CAB considered the Petitioner's treatment. (March 13/83-84, Ex. 122) However, like Connolly, they found he participated on a "superficial level." (March 13/83) The CAB, like Connolly, did not find that he integrated his treatment to himself, i.e. he needed "to go deeper with these issues." (March 13/84, 113) The CAB, like Connolly, found the Petitioner's insight still ignores the level of violence or the "predatory" nature of his last offense. (March 13/84, 121-122)

Like Connolly, they found his release plan to be deficient because the Petitioner intended to go back to an "environment" that had already proved not to be supportive. (March 13/89-90) Like Connolly, the CAB did not find age to be a sufficient protective factor because he committed his last offense when he was 44 years old. (March 13/89) The CAB, like Connolly (Ex.

18, 32-33), noted the Petitioner's experience with sexual abuse as a child. (March 13/109-110) The CAB, like Connolly, found that the Petitioner "struggles interpersonally" with other inmates and that he was "hyper vigilant" of other inmates' behavior.[13] (March 13/109)

Essentially, the CAB found the Petitioner is "likely to reoffend," given the "repetitive and compulsive" sex offense history and his personality disorder, causing "Mr. Green [to] have a general lack of ability to control his sexual impulses." (March 13/86-88, 110)

ARGUMENT

I. Justice Pierce did not abuse his discretion when he denied the Commonwealth's motion for new trial.

"The decision to grant or deny a motion for a new trial rests in the discretion of the trial judge, and an appellate court will not vacate such an order unless the judge has abused that discretion." W. Oliver Tripp Co. v. American Hoechst Corp, 34 Mass.App.Ct. 744, 748 (1993) This Court should not reverse Justice Pierce's decision unless the "original

---

[13] Connolly found that people didn't want to be in his support groups (March 12/185); and he was hypercritical of other inmates. (March 13/31-32)

instructions were erroneous" and, given that instruction, the result of the trial "might have been different absent the error." Masingill v. EMC Corp., 449 Mass. 532, 540 n. 20 (2007); Blackstone v. Cashman, 448 Mass. 255, 270 (2007)(error must be prejudicial) The error must affect "the substantial rights of the objecting party." Coca-Cola Bottling Co. of Cape Cod v. Weston & Sampson Engrs., Inc., 45 Mass. App. Ct. 120 , 123-124 (1998); McIntyre v. Boston Redev. Authy., 33 Mass. App. Ct. 901 , 903 (1992)(harmless error) The "substantial rights of the [appellant is] not injuriously affected if the course taken reaches the inevitable result of the case." S. Solomont & Sons Trust v. New England Theatres Operating Corp., 326 Mass. 99, 110 (1950) The error must be of 'such a nature as to affect the impartiality, purity and regularity of the verdict itself.' Runshaw v. Bernstein, 347 Mass. 405, 407-408

(1964)(citations omitted), cited in Reporter's Notes for Rule 61[14]

A jury instruction, obviously, must "enable them to render a proper verdict." Pfeiffer v. Salas, 360 Mass. 93, 100 (1971) The judge must give "full, fair, correct and clear instructions as to the principles of law governing all the essential issues presented, so that the jury may understand their duty and be enabled to perform it intelligently." Fein v. Kahan, 36 Mass. App. Ct. 967, 968 (1994)(citations omitted) However, every "possible correct statement of law need not...be included in jury instructions if the instructions as given are correct and touch on the fundamental elements of the claim." Kobayashi v. Orion Ventures, Inc., 42 Mass. App. Ct. 492 , 503 (1997) That is why a 'charge is to be considered as a whole to determine whether it is legally correct, rather than tested by fragments which may be open to just criticism.' In re McHoul, 445 Mass. 143, 156 (2005), citing Gilchrist v.

---

[14] Only those errors that "injuriously affected the substantial rights" of the appellant warrant reversal. G.L. c. 231, 119 "No ...error or defect in any ruling or order or in anything done or omitted by the court or by any of the parties is ground for granting a new trial...unless refusal to take such action appears to the court inconsistent with substantial justice." Mass. R. Civ. P. 61

Boston Elevated Ry., 272 Mass. 346 , 353 (1930) "This principle applies to criminal and civil cases alike." McHoul, supra, citing Commonwealth v. Pinnick, 354 Mass. 13, 15 (1968) The reviewing Court should be particularly reluctant to reverse a jury verdict of not sexually dangerous because "as a matter of fundamental fairness under the due process clause of the Fourteenth Amendment to the United States Constitution, a finding that an individual is no longer sexually dangerous" is analogous, albeit not identical, to "a criminal judgment of acquittal." Commonwealth v. Travis, 372 Mass. 238, 249 (1977)

With these principles in mind, it must be noted that Souza was resolved on the issue of whether the directed verdict was reversible not the jury instruction. Souza, supra at 172-173 The Souza Court did not conclude the instruction at issue required a new trial. Id. As such, Justice Pierce was not necessarily compelled to order a new trial. That order was for him to determine, in his discretion, based on his experience with this particular case's record.

Justice Pierce's decision to deny the motion for new trial does not demonstrate "clear error of judgment" and his consideration of the relevant

factors was perfectly reasonable. L.L. v. Commonwealth, 470 Mass. 169, 185, n. 27 (2014)(citations omitted)[15] Justice Pierce observed the witnesses, noted the exhibits, heard the arguments and watched the jury. Justice Pierce set out his reasons on the record and in a written memorandum. (April 3/21-23, Add.)

On the record, as to why he denied the motion for new trial, he said,

> And the Court's reasons for denying that motion at that time were, first, that the petitioner's case was tried with the express understanding that the CAB limiting instruction would be given. There was discussion with counsel before that in other cases this court had not given the CAB instruction, but that it has subsequently been convinced that it was appropriate in this case. So there was -- so the case was tried with everyone understanding that the CAB limiting instruction would be given.
>
> Second, by the time the Souza decision was issued and the parties became aware of it, the Court became aware of it, and the hearing was convened, the jury had been in the Court's estimation deliberating for approximately seven hours, five hours the previous days, two hours that morning, prior to the hearing.
>
> [Third] The Court believes that reinstructing the

---

[15] The Supreme Judicial Court recently ruled that "a judge's discretionary decision constitutes an abuse of discretion where we conclude the judge made "a clear error of judgment in weighing" the factors relevant to the decision...such that the decision falls outside the range of reasonable alternatives." L.L. v. Commonwealth, supra.

> jury at that time had the potential for confusion. That reinstructing by omitting one paragraph in a twenty-some-odd-page set of instruction had the potential for confusing the jury and distracting the jury from a fair consideration of all of the evidence. And for that reason, the request for reinstruction was denied.
>
> [Fourth] The Court then on March 23rd, after a -- after a submission by the Commonwealth of a written motion for a new trial denied that motion, and the reason for that denial was essentially the Court's conclusion that even assuming that the limiting -- the CAB limiting instruction was erroneous, that it was unlikely to have affected the jury's verdict.

(April 3/21-23)(emphasis added) In his written memorandum Justice Pierce said much the same as he did on the record. (Add. 3-4) In writing he did add, as to why the instruction "was unlikely to have affected the jury's verdict,"

> The Petitioner had served substantial prison sentences after criminal convictions and had been confined to the Treatment Center for approximately four years. The qualified examiner who testified for the Commonwealth was effectively cross-examined regarding her opinion that the Petitioner remained sexually dangerous and the Petitioner's expert witness testified plausibly that he had effectively undertaken treatment at the Treatment Center and that he was no longer sexually dangerous.

(Add. 4-5) These findings are not unreasonable.

A. The Commonwealth was not handicapped in presenting its case by the instruction at issue.

The Commonwealth was able to present a persuasive case that the Petitioner was sexually dangerous. The Commonwealth presented two qualified experts and their reports and the Commonwealth presented voluminous other exhibits. (March 12/5, 63, March 13/2, 65, Ex. 1-399) Given this evidence the trial court denied the Petitioner's requested directed verdict because "after viewing the evidence (and all permissible inferences) in the light most favorable to the Commonwealth, any rational trier of fact could have found, beyond a reasonable doubt, the essential elements of sexual dangerousness as defined by G. L. c. 123A, § 1." Souza, supra at 169 (citations omitted)

The Commonwealth was able to argue that the diagnosis it had for the Petitioner was corroborated by three experts. (March 17/30) The Commonwealth was able to claim it had not only Dr. Connolly but also the "the five members of the CAB," including Dr. Johnson on its side. Id. The Commonwealth even had reason to put Dr. Gans on its side because of her Static 99R score and her diagnosis. (March 17/40-41)

The Commonwealth was not hampered in confronting the Petitioner's evidence. The Commonwealth pointed out the flaws in Dr. Plaud's report and testimony. (March 17/36-38, 40) The Commonwealth did the same for Dr. Bard.[16] (March 17/38-40) The Commonwealth could rebut age as protective factor. (March 17/43-44) The Commonwealth could rebut the effectiveness of the Petitioner's treatment. (March 17/30, 34, 40, 44-45)

Most notably, the Commonwealth was able to deal, substantively and rhetorically with the focus on Dr. Connolly. Dr. Connolly was a good witness. Her report was thorough and touched on all the relevant points. (Ex. 13-37) On the stand, she was observed as being "nervous." (March 17/35) However, she was also a highly qualified and experienced clinician (March 12/63-67) who demonstrated that she knew what she was doing. (March 12/75-76) The Petitioner was able to confront her. However, she was not a push over. She stood up to cross-examination as well as any expert. (March 12/160-161, March 13/15, 20-22, 38-43, 49-50) Unlike some Commonwealth witnesses she had command of the research. (March 13/44, 58-59)

---

[16] The Commonwealth was able to address the weaknesses in Mr. Grant's testimony. (March 17/42)

Dr. Connolly was arguably a better witness than Dr. Johnson. Dr. Johnson received her license relatively recently.[17] Johnson did not interview the Petitioner. (March 13/74) Under cross examination, Jr. Johnson seemed to flounder regarding something very basic, i.e. the DSM-V elements for antisocial personality disorder, an elementary issue in sexually dangerous person cases. (March 13/120-121) Otherwise, Dr. Johnson's evidence was essentially identical to Dr. Connolly's. (Br. 15-21)

Dr. Connolly's evidence allowed the Commonwealth to sing her praises in closing argument. Her assessment was detailed and comprehensive. (March 17/35) Dr. Connolly's report had sources, dates, the Static 99R, risk analysis, and an account of everything the Petitioner said to her. Id. Arguably, the instruction at issue was a rhetorical boon to the Commonwealth because it drew the jury's attention to the better witness in this case.

The Commonwealth's closing doesn't talk much, if at all, about Dr. Johnson. (March 17/29-46) However, that was the Commonwealth's choice. The instruction at

---

[17] Johnson was licensed in 2007 while Connolly got it in 1994. (March 12/64, March 13/66)

issue did not say the CAB evidence had no weight or even less weight than Dr. Connolly, only that Connolly had to be credited. (March 17/66-67) The Commonwealth could have drawn credit to Dr. Connolly, consistent with the instruction, by showing, e.g. how five other experts (the CAB) agreed with her on all the critical aspects. (Br. 15-21) The Commonwealth simply chose not to do this; maybe because the CAB evidence had nothing to add. Likewise, it may be that the Petitioner's counsel chose to concentrate her argument on Dr. Connolly.[18] (March 17/16-21) Focusing on one witness at the expense of another could have well been a strategic mistake if Dr. Johnson and the CAB evidence had added anything of critical value.

Dr. Johnson and the CAB report were basically five more people who could say the same as Dr. Connolly. (Br. 15-21) The instruction did not exclude the CAB evidence, rather it pointed out its value to corroborate. (March 17/66-67) However, even if Judge Pierce had excluded the CAB evidence, given its duplicative nature that, that would hardly be prejudicial to the Commonwealth in this case. Compare

[18] In fairness, the Petitioner submits his closing did not ignore the CAB but simply mentioned it where it was helpful. (March 17/14, 16, 26)

Commonwealth v. Bonds, 445 Mass. 821, 831 (2006)(admission of cumulative evidence within judge's discretion); Commonwealth v. Fulgham, 23 Mass.App.Ct. 422, 423-427 (1987)(the judge did not err in denying the defendant's request for an instruction to the jury that they might draw an inference against the Commonwealth from its failure to call two particular witnesses to testify as to fresh complaint, where these persons' testimony would have been, at most, cumulative of a police officer's fresh complaint testimony); Commonwealth v. Brown, 449 Mass. 747, 769-770 (2007)(refusal to admit the defendant's psychiatric records, which were cumulative of the extensive evidence already presented by the defendant, did not constitute an abuse of discretion or violate the defendant's constitutional right to present a defense); Commonwealth v. Fritz, 472 Mass. 341 (2015)(erroneous allowance of cumulative expert testimony harmless beyond a reasonable doubt)

B. The jury instructions as a whole enabled the jury to render a proper verdict.

The jury instruction must be read as a whole. In re McHoul, supra. It must layout for the jury "the fundamental elements of the claim." Kobayashi, supra.

It must "enable them to render a proper verdict." Pfeiffer, supra. There is no reason to believe the instructions in this case did not accomplish all this.

The jury was told at the very beginning of the case what was their proper function.

> Your function as the jury is to determine the facts of this case. You are the sole and the exclusive judges of the facts. You alone determine what evidence to believe, now important any evidence is that you do believe and what conclusions all the believable evidence leads you to. You will have to consider and weight the testimony of all of the witnesses who will appear before you, and you alone will determine whether to believe any witness, and the extent to which you believe any witness.
> It is part of you responsibility, ladies and gentlemen, to resolve any conflicts in testimony that may arise during the course of the trial and to determine ultimately where the truth lies.

(March 12/29-30) In particularly, they were told how to deal with experts.

> So as with any other witness, it is completely up to you to decide whether you accept the testimony or an expert witness, including the opinions that the witness gives. It is also entirely up to you to decide whether you accept the facts relied upon by the expert and to decide what conclusions, if any, you draw from the expert's testimony.
> You must remember that expert witnesses do not decide cases; juries do. And I'll remind you of that again at the end of the trial. It is your role not the role of the expert witnesses to decide the ultimate issue of whether or not the petitioner, Mr. Green, is today a sexually dangerous person.

(March 12/32-33)

The jury was instructed at the end of the trial even more comprehensively. Proof beyond a reasonable doubt was explained. (March 17/61-65, Ex. 582-586) The fundamental elements' of the Commonwealth's case were explained. (March 17/66-80, Ex. 586-594) And, again, the jury was told how to properly consider the evidence.

> You should consider all of my instructions as a whole. You may not ignore any instruction or give special attention to any one instruction.
>
> You're [sic] function as the jury is to determine the facts of this case. You're [sic] are the sole and the exclusive judges of the facts. You alone determine what evidence to accept, how important any evidence is that you do accept, and what conclusions to draw from all of the evidence.

(March 17/48)(emphasis added)

> You are to decide what the facts are solely from the evidence admitted in this case. And again, not from suspicion and not from conjecture. Here the evidence consists of the testimony of the witnesses as you recall it and the documents that were received into evidence as exhibits during the course of the trial.

(March 17/51)

> Of course, the quality or strength of the proof is not determined by the sheer volume of evidence or the number of witnesses or the number of exhibits. It is the weight of the evidence. Its strength in tending to prove the issue at stake that is important. You might find that a smaller number of witnesses who testify to a particular fact are more believable than a larger number of witnesses who testified to the opposite or vice versa. It is up to you to evaluate the evidence

and assign it whatever weight you feel it is entitled to receive.

(March 17/53)(emphasis added)

The opening statements, the closing arguments just completed by counsel, are not evidence. They are only intended to assist you in understanding the evidence and the contentions of the parties. Again, my instructions and anything I have said or done during the trial it's not evidence.

(March 17/54)

It will be your duty to decide any disputed questions of fact. You will have to determine which witnesses to believe and how much weight to give their testimony. You should give the testimony of each witness whatever degree of belief and importance you judge it fairly entitled to receive. You are the sole judges of the credibility of the witnesses; and if there are conflicts in the testimony, it is your function to resolve those conflicts.

You may believe everything the witness says only part of it or none of it. If you do not believe a witness' testimony that something happened of course your disbelief is not evidence that it did not happen. When you disbelieve a witness, that just means that you have to look elsewhere for credible evidence about that issue.

In deciding whether to believe a witness and how much importance to give a witness' testimony, you must look at all of the evidence. Often it may not be what a witness says but how the witness says it that gives you a clue whether to accept that witness' version of an event as believable.

(March 17/54-55)(emphasis added)

You may consider the witness' character, appearance and demeanor on the witness stand, frankness or lack of frankness in testifying, whether the witness' testimony is reasonable or unreasonable, probable or improbable. You may

> take into account how good an opportunity the witness had to observe the facts about which that witness testified, the degree of intelligence the witness shows and whether the witness' testimony seems accurate.
>
> You may also consider any motive the witness may have for testifying, whether the witness displays any bias in testifying, and whether or not the witness has any interest in the outcome of the case.[19]

(March 17/56) Notably, the jury was told again how to put experts in their place.

> Because a particular witness has specialized training and experience in his or her field does not put that witness on a higher level than any other witness, and you're not to treat the so-called expert witness just like --and you are to treat the so-called expert witness just like you would treat any other witness.
>
> In other words, as with any other witness, it is completely up to you to decide whether you accept the testimony of an expert witness, including the opinions that the witness gave. It is also entirely up to you to decide whether you accept the facts relied upon by the expert and to decide what conclusions, if any, to draw from the expert's testimony.
>
> You are free to reject the testimony opinion of such witness in whole or in part if you determine that the witness' opinion is not based on sufficient education and experience or that the testimony of the witness was motivated by some bias or interest in the case.
>
> Please keep in mind that you alone decide what the facts are. If you conclude that an expert opinion is not based on facts, then you find --

---

[19] Arguably, both of the Commonwealth's witnesses were beholden to the Department of Correction and Forensic Health Services. (March 12/144-146, March 13/111-112)

> as you find those facts to be, then you may reject the testimony and the opinion of the expert in whole or in part. Remember, as I said before, expert witnesses do not decide cases; juries do.
>
> In the last analysis, an expert witness is just like any other witness in the sense that you alone make the judgment about how much credibility and weight you give the expert's testimony, and what conclusions you draw from that testimony.

(March 17/57-59)(emphasis added)[20]

Reading these instructions as a whole, it is clear the jury would have appreciated their role and their autonomy to give weight and credibility however they chose. It cannot be said the Commonwealth was prejudiced by the instruction at issue. Compare Wyatt, *petitioner*, 428 Mass. 347, 353-354 (1998)(Commonwealth was not prejudiced by jury instruction where the judge had otherwise given careful instructions); Commonwealth v. Leahy, 445 Mass. 481, 499-501 (2005)(judge acted within his discretion in refusing to reinstruct the jury)

---

[20] Of note, also, is the instruction on the jury's autonomy *in re* the weight and credibility to give exhibits. (March 17/59)

C. The instruction at issues did not call for the omission of any evidence or for the jury to ignore any evidence.

The instruction at issue is not logically an issue at all. The jury was given the elements of sexual dangerousness. (March 17/66-80) Given those elements they would necessarily need to find "that Mr. Green suffers from a mental condition that causes him serious difficulty in controlling his sexual impulses at the present time." Id. If the Commonwealth's case was convincing to the jury they would have found support for the necessary elements in either Dr. Johnson's testimony or in the exhibits or both. That evidence, i.e. other than Dr. Connolly's, if believed, would have fully corroborated Dr. Connolly's opinion. The jury was not told to ignore Dr. Connolly or any of the other evidence. They were simply told they had to believe her conclusion that "a mental condition...causes [the Petitioner] serious difficulty in controlling his sexual impulses at the present time." (Ex. 586) They would have to have credited her if they believed her evidence or any of the other evidence proved the necessary elements. This is so because if any of the other evidence, alone or

collectively, was sufficient to the jury then it would be obvious that Dr, Connolly was correct in her opinion. That the jury found the Petitioner not to be sexually dangerous means they simply did not believe that he was.

D. The Commonwealth's case, as Justice Pierces observed, was simply flawed to a degree that made the jury's verdict reasonable if not inevitable.

The Petitioner was a 56 year old man. (Ex. 75) He is a High School graduate, who worked his whole life[21] and even served honorably in the military. (Ex. 17-19) His last crime was committed 13 years ago. (Ex. 8)

Admittedly, he has committed very violent sexual assaults on three separate women, each on a separate occasion, between prison terms. (Ex. 13, 14-15, 17) However, the Commonwealth's explanation for that behavior was weak. The Commonwealth claimed he had deviant arousal to violence. (March 12/104) Yet, the Commonwealth does not have any mental abnormality to explain the alleged deviant arousal. (March 13/12) The Commonwealth says he is antisocial but his antisocial diagnosis is what clinicians use when an individual does not meet the establish elements for antisocial personality disorder. (March 13/8) His personality

[21] Obviously not in prison.

disorder is supposed to be chronic. (March 12/101) Yet, it is also supposed to abate as one gets towards 50 years old. (March 13/86-87, 116) The diagnosis is based on past behavior. (March 13/12) And the Petitioner is "not impulsive today." (March 13/10-11) In fact, he has only disciplinary report in the last three years. (March 13/117-119)

The Commonwealth points to the violence the Petitioner used against his victims. (March 12/104) But rape is inherently a violent crime. (March 13/115) The Commonwealth points to the failure of his pre-2002 sex offender treatment. (March 13/79-80) However, that treatment was for one year. (March 12/120-121, March 13/100-101) It was "pretreatment," only "introductory phases." (March 12/120-121) The Commonwealth cannot dispute the Petitioner has been in voluntary treatment since 2007. (March 12/115, 142-143, March 13/123-124)

His current treatment is "intense." (March 13/123-124) It is the highest level of treatment offered at the MTC. (March 12/30) It is the newest treatment. (March 12/153) It is incredibly demanding. (March 12/151, 167) It requires he master each level. (March 13/128-129) One is suspended from treatment if one misbehaves. (March 12/157-158) Yet, the Petitioner

has finished all but one of the intense program's five pathways. (March 13/7) This evidence, backing the Petitioner, is just some of what one can find to support the Petitioner in the Commonwealth case.

The jury also heard from three more experts, including a Qualified Examiner. (March 13/166, March 16/10, 82) They were qualified. (Ex. 401, 465, 481) They did professional assessments of the Petitioner's risk. (Ex. 438, 465, 481) Yet, they all found the Petitioner not to be sexually dangerous. (Ex. 440, 471, 512)

In particular, the jury heard Dr. Gans. (March 16/82-135) She has been a psychologist almost thirty years. (March 11/83) She was on the CAB form 1999-2006. (Ex. 476) In this case, she was hired as a Qualified Examiner. (March 16/86-87) Her report was just as thorough as Dr. Connolly's. (Ex. 481-512) It was not in her interest to find the Petitioner not sexually dangerous, yet she did. (Ex. 511-512)

The jury was ordered not to find the Petitioner sexually dangerous if they had a reasonable doubt about it. (Ex. 583) It would be astonishing if they did not have a doubt in this case. The Commonwealth was trying to recommit a man who had dedicated himself

to treatment and was doing well. He apparently was sexually dangerous at some point in the past but the Commonwealth did not have a persuasive case of why he was still sexually dangerous. Instead, they were left having to convince a jury that their best treatment, even if done successfully, does not really work. Even their own Qualified Examiner did not believe that. It is for these reasons the Commonwealth's case failed and no other.

II. The Single Justice's order to stay the Petitioner's release was not based on a correct set of facts.

This Court reviews an order of a single justice for an abuse of discretion or clear error of law. Commonwealth v. Springfield Terminal Railway Co., 77 Mass. App. Ct. 225, 229 (2010) However, the Single Justice was not presented with a full and correct record. The Commonwealth submitted exhibits to the Single Justice that had not been redacted as they had been at trial. (R. 87-183) Also the Single Justice did not have the trial transcripts. As such, the Petitioner submits, this Court should give some deference to the trial court's decision. Springfield Terminal Railway Co., supra. In any case, the Single

Justice's allowance of a stay was an abuse of discretion.

The defendant submits that the Single Justice did not properly weigh the factors relevant to its decision. L.L. v. Commonwealth, 470 Mass. 169, 185, n. 27 (2014)(citations omitted) Specifically, the Single Justice assumed the allegedly erroneous instruction would be reversible error. However, the Single Justice did not have the trial transcripts showing the other instructions that made clear to the jury how they were to properly consider the evidence. (Br. 31-36) The Single Justice was also given an unredacted and so exaggerated version of what admissible evidence the jury had considered. (R. 87-183) As such, the Single Justice would have had an exaggerated sense of the strength of the Commonwealth's case and the risk the Petitioner posed.

A jury has found the Petitioner not sexually dangerous. Deference should be given to the jury's verdict. Segal v. Gilbert Color Systems, Inc., 746 F.2d 78 (1st Cir. 1984). Given the jury's verdict, substantive due process dictates that the Petitioner should be released. Commonwealth v. Travis, 372 Mass. 238, 247-248 (1977)

The Commonwealth complains of the trial court's CAB instruction, found to be "ill advised" in Souza, supra. Justice Pierce considered the claimed error in his April 3, 2015 written order. (Add. 4) The trial court found that even if the instruction was in error, "it was unlikely to have affected the jury's verdict." Id.

The Petitioner submits the claim, that the trial court cannot order the Petitioner released with "appropriate conditions," appears to be inconsistent with the Supreme Judicial Court's order in Commonwealth v. Parra, 445 Mass. 262, fn. 5 (2005). In that case's docket, entry # 9, the Supreme Judicial Court entered the following Order,

> The respondent shall be released pending the outcome of this appeal, or until further order of this Court, on appropriate conditions to be determined, after hearing, by a judge in the Superior Court.[22]

(R. 52) In addition to the order for "appropriate conditions" in Parra, supra, it should be noted that same order was made by the trial court in Souza, supra The trial court order in Souza, supra was then affirmed by the Single Justice of this Court in Souza

[22] Counsel has since discovered that the Probation Service did, in fact, monitor Mr. Parra.

v. Commonwealth, 2013-J-0234 (Rubin, J.) and by Justice Duffly as the Supreme Judicial Court Single Justice in Souza v. Commonwealth, SJ-2013-0230. It would be remarkable if all three Justices were mistaken.

The Court may find such authority to order the monitoring of conditions in G.L. c. 276 § 85 which states a probation officer, "shall perform such other duties as the court requires." The Petitioner submits the more reasonable course here is to vacate the stay of the Petitioner's release and to instead order his release with whatever "appropriate conditions," the Court determines.

Admittedly, Parra, is procedurally distinguishable from this case. It was a G.L. c. 123A § 12 case that had not yet gone to trial. However, it still remains that the Supreme Judicial Court ordered Parra released upon conditions. The Supreme Judicial Court would have had no power to do if the Probation Services' arguments were correct.

The Probation Service's objection to monitoring conditions on release threatens to infringe on the inherent powers of the judiciary in contravention of art. 30 of the Massachusetts Declaration of Rights. It

likewise threatens the Petitioner's rights to relief from this Court.

The Supreme Judicial Court explained the relevant power the judiciary, by necessity, must have to function.

> Inherent judicial...powers...exist independently, because they "directly affect[] the capacity of the judicial department to function" and cannot be nullified by the Legislature without violating art. 30... The scope of inherent judicial authority reaches beyond traditional adjudicatory powers and encompasses (but is not limited to) the court's power to commit the fiscal resources of the Commonwealth and other governmental agencies necessary to ensure the proper operation of the courts...and the power to control and supervise personnel within the judicial system,...The last is perhaps the least controversial and includes a judge's power to "to control [a court's] own proceedings, the conduct of participants, the actions of officers of the court and the environment of the court." ...Into this scheme, we fit the roles of clerks, assistant clerks, and probation officers.

First Justice of the Bristol Div. of the Juvenile Court Dep't v. Clerk-Magistrate of the Bristol Div. of the Juvenile Court Dep't, 438 Mass. 387, 396-399 (2003) (resolving internal dispute between members of judicial department)(citations omitted)

The Probation Service seeks to interfere with a necessary performance of this Court's power under Article 30 and its responsibility under Articles 11

and 29. Id.(judicial power flows from Articles 11, 29 & 30)

CONCLUSION

The Court should vacate the stay of the Petitioner's discharge pending appeal, releasing him under whatever conditions it deems appropriate.

JAMES GREEN
By his attorney

Michael A. Nam-Krane
BBO # 636003
PO BOX 301218
Boston, MA 02130
617.553.2366

Certificate of Compliance

I, Michael A. Nam-Krane, hereby certify pursuant to Mass.R.App.P. 16(k) that this brief complies with the rules of court that pertain to the filing of briefs, including those required by Mass.R.App.P. 16(a)(6), 16(e), 16(f), 16(h), 18 & 20.

_____

Michael A. Nam-Krane

ADDENDUM

COMMONWEALTH OF MASSACHUSETTS

UNIFIED SESSION AT SUFFOLK

SUPERIOR COURT
SUCR2011-10838

JAMES GREEN

vs.

COMMONWEALTH OF MASSACHUSETTS

ORDER ON COMMONWEALTH'S MOTION FOR A NEW TRIAL OR, IN THE ALTERNATIVE, FOR A STAY OF DISCHARGE ORDER PENDING APPEAL

The matter is before the court on the Commonwealth's Motion for a New Trial or, in the Alternative, for a Stay of Discharge Order Pending Appeal. As set forth below, the motion for a new trial was previously DENIED on March 23, 2015. After a hearing this date, the Petitioner is ordered released on April 8, 2015.

PROCEDURAL BACKGROUND

A jury trial of the above-captioned G. L. c. 123A, § 9 case began on March 12, 2015. The trial continued on March 13 and March 16. On March 17, counsel for the Petitioner and the Commonwealth made closing arguments to the jury, after which the court gave its final instructions.

The court's instructions included the following:

> In order to find that Mr. Green is a sexually dangerous person, you must credit the opinion of Dr. Nancy Connolly who testified in her capacity as a Qualified Examiner and opined that Mr. Green is a sexually dangerous person as defined in the law at the present time. It is not required that you accept all of the reasons given by Dr. Connolly for her opinion; you may find support for the opinion anywhere in the evidence, including in

> the testimony of Dr. Angela Johnson, the [Community Access Board or "CAB"] representative. However, you cannot find that Mr. Green is a sexually dangerous person today unless you credit the opinion of Dr. Connolly that Mr. Green suffers from a mental condition that causes him serious difficulty in controlling his sexual impulses at the present time.

(Referred to herein as the "CAB limiting instruction.")

The jury's deliberations began at approximately 11:00 AM on March 17, 2015. At 4:10 PM, the jury was excused for the evening without reaching a verdict. Before excusing the jury, the trial court judge explained to the jury that he[1] would not be present in court the next day, that a second Superior Court judge would be standing in, but that the trial court judge would be available by telephone, if necessary.[2]

On March 18, 2015, jury deliberations resumed at 9:35 AM. At approximately 10:10 AM, the jury submitted a question, not related to the pending motion.[3] At approximately 10:45 AM, a second Superior Court judge conferred with counsel and responded to the jury's question, in writing.[4]

Thereafter, the Commonwealth became aware that the Massachusetts Appeals Court had issued its opinion in the case of George Souza v. Commonwealth, (No. 13-p-1052). In Souza, a divided court found that the trial

---

[1] Referred to herein as the "trial court judge."

[2] These arrangements were discussed with the parties prior to being announced to the jury. Neither party objected to the arrangements, including the involvement of a second Superior Court judge.

[3] "Question: Are there ever any circumstances under which the Commonwealth does not oppose the release of a petitioner who has previously been deemed a sexually dangerous person?"

[4] The court wrote to the jury, "Mr. Foreman and members of the jury: such circumstances or considerations ought not to be part of deliberations and cannot form the basis of your verdict."

judge erred in allowing the petitioner's motion for a directed verdict. The majority opinion also addressed the Commonwealth's argument that the trial court erred in instructing the jury with regard to the extent it was to rely on the testimony of the Commonwealth's qualified examiner, as compared to the testimony of a representative of the CAB.[5] The Appeals Court concluded that this instruction is "not compelled" by Johnstone, petitioner, 453 Mass. 544, 553 (2009) "and that it is otherwise inadvisable."

Upon learning of the Souza decision, the Commonwealth made an oral request that the trial court reinstruct the deliberating jury, without the CAB limiting instruction. At 11:35 AM on March 18, 2015, the trial court judge conducted a hearing, via telephone, regarding the Commonwealth's request. After hearing from the parties and reviewing the Souza decision, the court denied the request that the jury be reinstructed.

The court's reasons for denying the motion were as follows: First, the Petitioner's case had been tried with the understanding that the CAB limiting instruction would be given. The court discussed with the parties before the presentation of evidence that while there had been other cases where the court had not given the limiting instruction, the court had been convinced that in this case it was appropriate. Second, by the time the Souza decision became known to the parties and the court, the jury in the Petitioner's case had been deliberating for over seven hours. Reinstructing the jury would have required the jury to begin its deliberations anew. Finally, the court believed that reinstructing the jury by omitting one paragraph from its original instructions had the potential

[5] Specifically, the judge had instructed the jury that: "You heard the testimony of Dr. Tomich, a representative of the community access board. The law permits a representative of the community access board to testify in all proceedings like this one, and you may certainly rely upon the testimony of Dr Tomich. However, you cannot find that the petitioner, Mr. Souza, is sexually dangerous based solely on the testimony of Dr. Tomich. In order for you to find that Mr. Souza is today a sexually dangerous person, you must find support for that determination in the opinion that [sic] Dr. Kelso, who testified as a qualified examiner."

for confusing the jury and distracting it from a fair consideration of all the evidence.

Shortly after 2:15 PM, on March 18, 2015, the jury returned a verdict finding that the Commonwealth had not sustained its burden of proving, beyond a reasonable doubt, that the Petitioner was presently a sexually dangerous person.

Following the jury verdict, the Commonwealth made an oral request to stay the Petitioner's discharge to allow time for the Commonwealth to seek appellate review. No action was taken on that request on March 18, 2015, and the matter was scheduled for a hearing on March 23. On March 23, the Commonwealth filed a written motion seeking a new trial or in the alternative a stay of the Petitioner's discharge "until March 30, 2015 to permit the Commonwealth to seek a stay from the appellate courts." The Petitioner filed a written opposition to the Commonwealth's motion, including a request that the Petitioner be discharged from the Massachusetts Treatment Center (the "Treatment Center").

On March 23, 2015, the trial court judge conducted a hearing on the Commonwealth's motion. After reviewing the pleadings and hearing from the parties, the court denied the request for a new trial.

In denying the motion for a new trial the court considered "whether the original instructions were erroneous as a matter of law, and, if so, whether the result in the first trial might have been different absent the error." Kassis v. Lease & Rental Mgmt. Corp., 79 Mass. App. Ct. 784, 788 (2011). A motion for new trial may only be granted if the error gives rise to a substantial risk of a miscarriage of justice. Wojcicki v. Caragher, 447 Mass. 200, 216 (2006); Commonwealth v. Russell, 439 Mass. 340, 345 (2003). A substantial risk of a miscarriage of justice exists when the court has "a serious doubt whether the result of the trial might have been different had the error not been made." Russell, 439 Mass. at 345, quoting Commonwealth v. Randolph, 438 Mass. 290, 298 (2002). Here, assuming that the limiting instruction was erroneous, the court concluded that it was unlikely to have affected the jury's verdict. The Petitioner had served substantial

prison sentences after criminal convictions and had been confined to the Treatment Center for approximately four years. The qualified examiner who testified for the Commonwealth was effectively cross-examined regarding her opinion that the Petitioner remained sexually dangerous and the Petitioner's expert witness testified plausibly that he had effectively undertaken treatment at the Treatment Center and that he was no longer sexually dangerous.

After denying the motion for a new trial, the court continued the matter to March 25, 2015, for a further hearing on the Commonwealth's request for a stay. The court advised the parties that it was inclined to deny the Commonwealth's request to continue holding the Petitioner at the Treatment Center and to release him under the supervision of the Probation Department, with GPS monitoring and other conditions, including that he reside at the New England Center for Homeless Veterans, 17 Court Street, Boston, and that he not consume alcohol or non-prescription drugs.[6] The Commonwealth advised the court orally that it intended to seek appellate review of both the court's refusal to re-instruct the jury without the CAB limiting instruction and the court's denial of the Commonwealth's motion for a new trial.

On March 25, 2015, the parties reported to the court that the Probation Department at Suffolk Superior Court had requested additional time to consider its position regarding supervision of the Petitioner, pending appeal. Thereafter, the case was scheduled for a hearing on April 3, 2015.

On April 2, 2015, General Counsel for the Commissioner of Probation filed with the court Probation's Written Statement Upon Request of the Court ("Probation's Statement"), which concludes that the Probation Department lacks jurisdiction to supervise post-dispositional probation except where an individual is before the court in criminal or juvenile sessions charged with an "offense or

[6] The court advised the parties that it was informed in this regard by the trial court in Souza, where after directing a verdict in favor of the petitioner, the court ordered Mr. Souza released under the supervision of probation, with GPS monitoring and other conditions.

crime," or "adjudicated a delinquent." G. L. c. 276, §§ 87, 87A and G. L. c. 119, § 58. [7]

After a further hearing on April 3, 2015, and having reviewed the Probation Department's submission, the court concludes that it does not have authority to release the Petitioner, with conditions supervised by probation. Chapter 123A, § 9 is clear, "Unless the trier of fact finds that such person remains a sexually dangerous person, it shall order such person to be discharged from the treatment center." Here, a jury has concluded that the Commonwealth failed to sustain its burden of establishing that the Petitioner is a sexually dangerous person, beyond a reasonable doubt.

Accordingly, the court orders that the Petitioner be discharged from the Treatment Center. The effective date of the discharge is April 8, 2015. The delayed discharge is intended to give the Commonwealth an opportunity to seek appellate review.

So Ordered.

Lawrence D. Pierce,
Justice of the Superior Court

DATE: April 3, 2015

[7] Probation explains in its submission that it agreed to supervise Mr. Souza erroneously, and that they intend to seek reconsideration of the court's order of probation supervision, in that case.

Gmail

Michael Nam-Krane <michael.namkrane@gmail.com>

2015-J-0133 - Notice of Docket Entry

Inbox

Appeals Court Clerk's Office <AppealsCtClerk@appct.state.ma.us> Wed, Apr 8, 2015 at 4:00 PM
To: "Michael A. Nam-Krane, Esquire" <michael.namkrane@gmail.com>

COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT CLERK'S OFFICE

April 8, 2015

RE: No. 2015-J-0133
Lower Ct. No.: SUCR2011-10838

JAMES GREEN
vs.
COMMONWEALTH

NOTICE OF DOCKET ENTRY

Please take note that on April 7, 2015, the following entry was made on the docket of the above-referenced case:

ORDER: Before me is the Commonwealth's motion to stay the petitioner's release from custody, pending resolution of the Commonwealth's appeal from a judgment entered on the jury's verdict that the petitioner is not sexually dangerous. Upon review of the materials submitted by the Commonwealth with its motion, and the petitioner's opposition, the Commonwealth's motion is ALLOWED.

As the Commonwealth observes in support of its motion, the jury instruction in the petitioner's case carried essentially the same error identified in Souza, petitioner, 87 Mass. App. Ct. 162, 172-173 (2014). The Commonwealth accordingly has demonstrated that its appeal raises issues worthy of appellate consideration. Furthermore, in its motion the Commonwealth persuasively articulates public safety concerns flowing from denial of the requested stay.

In his opposition, the petitioner points to the denial of a stay requested by the Commonwealth in Souza, petitioner, supra. However, the circumstances in Souza are different from those in the present case in at least two significant respects. First, in Souza the error in the jury instruction had not been established.[1] Second, the trial judge in Souza imposed conditions on the petitioner's release (including GPS monitoring) designed to mitigate the public safety risk and risk of flight arising from the petitioner's release, which the single justice had before him for review. In the present case, by contrast, the trial judge imposed no conditions on the petitioner's release.[2] (Green, J.). Notice/attest/Pierce, J.

Footnotes

[1] Though the petitioner in Souza has filed an application for further appellate review which remains pending, it is good law unless and until the Supreme Judicial Court grants further appellate review and vacates its holding. In any event, I note that the dissent in Souza was directed to the sufficiency of the evidence, and not the propriety of the jury instruction, and I find persuasive the opinion's explanation of the error in the jury instruction.

[2] I decline the petitioner's invitation to impose "appropriate conditions" on the petitioner's release, in the first instance, as an alternative to allowing the Commonwealth's motion for a stay.

Very truly yours,

The Clerk's Office

Dated: April 8, 2015

To: Michael A. Nam-Krane, Esquire
Sondra H. Schmidt, Esquire
Mary P. Murray, Esquire
Suffolk Superior Court Dept.

If you have any questions, or wish to communicate with the Clerk's Office about this case, please contact the Clerk's Office at 617-725-8106. Thank you.

Print

PART III COURTS, JUDICIAL OFFICERS AND PROCEEDINGS IN CIVIL CASES

TITLE II ACTIONS AND PROCEEDINGS THEREIN

CHAPTER 231 PLEADING AND PRACTICE

Section 119 Harmless error; disposition of judgment on appeal

Section 119. No error in either the admission or the exclusion of evidence and no error or defect in any ruling or order or anything done or omitted by the trial court or by any of the parties is ground for modifying or otherwise disturbing a judgment or order unless the appeals court or the supreme judicial court deems that the error complained of has injuriously affected the substantial rights of the parties. If either court finds that the error complained of affects only one or some of the issues or parties involved it may affirm the judgment as to those issues or parties unaffected and may modify or reverse the judgment as to those affected.

Print

PART IV CRIMES, PUNISHMENTS AND PROCEEDINGS IN CRIMINAL CASES

TITLE II PROCEEDINGS IN CRIMINAL CASES

CHAPTER 276 SEARCH WARRANTS, REWARDS, FUGITIVES FROM JUSTICE, ARREST, EXAMINATION, COMMITMENT AND BAIL. PROBATION OFFICERS AND BOARD OF PROBATION

Section 85 Powers and duties

Section 85. Each person who receives an appointment as a probation officer shall, within six months of the date of his appointment, attend a basic orientation training course conducted by the commissioner of probation pursuant to section ninety-nine. All probation officers shall attend at least every three years an in-service training course pursuant to this section. In addition to the other duties imposed upon him, each probation officer shall, as the court may direct, inquire into the nature of every criminal case brought before the court under the appointment of which he acts, and inform the court, so far as is possible, whether the defendant has previously been convicted of crime and in the case of a criminal prosecution before said court charging a person with an offence punishable by imprisonment for more than one year the probation officer shall in any event present to the court such information as the commissioner of probation has in his possession relative to prior criminal prosecutions, if any, of such person and to the disposition of each such prosecution, and all other available information relative thereto, before such person is admitted to bail in court and also before disposition of the case against him by sentence, or placing on file or probation. Such record of the probation officer presented to the court shall not contain as part thereof any information of prior criminal prosecutions, if any, of the defendant wherein the defendant was found not guilty by the court or jury in said prior criminal prosecution. Prior to the aforesaid disposition such record of the probation officer shall be made available to the defendant and his counsel for inspection. When it comes to the knowledge of a probation officer that the defendant in a criminal case before his court charged with an offence punishable by imprisonment is then on probation in another court or is then at liberty on parole or on a permit to be at liberty, such probation officer shall forthwith certify the fact of the presence of the defendant before his court to the probation officer of such other court or the parole authorities granting or issuing such parole or permit to be at liberty, as the case may be. He may recommend to the justice of his own court that any person convicted be placed on probation. He shall perform such other duties as the court requires. He shall keep full records of all cases investigated by him or placed in his care by the court, and of all duties performed by him. Every person released upon probation shall be given by the probation officer a written statement of the terms and conditions of the release.

PART I ADMINISTRATION OF THE GOVERNMENT
TITLE XVII PUBLIC WELFARE
Chapter 123A Care, Treatment and Rehabilitation of Sexually Dangerous Persons

§ 1. Definitions.

As used in this chapter the following words shall, except as otherwise provided, have the following meanings:--

"Agency with jurisdiction", the agency with the authority to direct the release of a person presently incarcerated, confined or committed to the department of youth services, regardless of the reason for such incarceration, confinement or commitment, including, but not limited to a sheriff, keeper, master or superintendent of a jail, house of correction or prison, the director of a custodial facility in the department of youth services, the parole board and, where a person has been found incompetent to stand trial, a district attorney.

"Community access board", a board consisting of five members appointed by the commissioner of correction, whose function shall be to consider a person's placement within a community access program and conduct an annual review of a person's sexual dangerousness.

"Community Access Program", a program established pursuant to section six A that provides for a person's reintegration into the community.

"Conviction", a conviction of or adjudication as a delinquent juvenile or a youthful offender by reason of sexual offense, regardless of the date of offense or date of conviction or adjudication.

"Mental abnormality", a congenital or acquired condition of a person that affects the emotional or volitional capacity of the person in a manner that predisposes that person to the commission of criminal sexual acts to a degree that makes the person a menace to the health and safety of other persons.

"Personality disorder", a congenital or acquired physical or mental condition that results in a general lack of power to control sexual impulses.

"Qualified examiner", a physician who is licensed pursuant to section two of chapter one hundred and twelve who is either certified in psychiatry by the American Board of Psychiatry and Neurology or eligible to be so certified, or a psychologist who is licensed pursuant to sections one hundred and eighteen to one hundred and twenty-nine, inclusive, of chapter one hundred and twelve; provided, however, that the examiner has had two years of experience with diagnosis or treatment of sexually aggressive offenders and is designated by the commissioner of correction. A "qualified examiner" need not be an employee of the department of correction or of any facility or institution of the department.

"Sexual offense", includes any of the following crimes: indecent assault and battery on a child under fourteen under the provisions of section thirteen B of chapter two hundred and sixty-five; aggravated indecent assault and battery on a child under the age of 14 under *section 13B1/2 of chapter 265*; a repeat offense under *section 13B3/4 of chapter 265*; indecent assault and battery on a mentally retarded person under the provisions of section thirteen F of chapter two hundred and sixty-five; indecent assault and battery on a person who has obtained the age of fourteen under the provisions of section thirteen H of chapter two hundred and sixty-five; rape under the provisions of section twenty-two of chapter two hundred and sixty-five; rape of a child under sixteen with force under the provisions of section twenty-two A of chapter two hundred and sixty-five; aggravated rape of a child under 16 with force under *section 22B of chapter 265*; a repeat offense under *section 22C of chapter 265*; rape and abuse of a child under sixteen under the provisions of section twenty-three of chapter two hundred and sixty-five; aggravated rape and abuse of a child under *section 23A of chapter 265*; a repeat offense under *section 23B of chapter 265*; assault with intent to commit rape under the provisions of section twenty-four of chapter two hundred and sixty-five; assault on a child with intent to commit rape under *section 24B of chapter 265*; kidnapping under *section 26 of said chapter 265* with intent to commit a violation of section

13B, 13B1/2, 13B3/4, 13F, 13H, 22, 22A, 22B, 22C, 23, 23A, 23B, 24 or *24B of said chapter 265*; enticing away a person for prostitution or sexual intercourse under *section 2 of chapter 272*; drugging persons for sexual intercourse under *section 3 of chapter 272*; inducing a person under 18 into prostitution under *section 4A of said chapter 272*; living off or sharing earnings of a minor prostitute under *section 4B of said chapter 272*; open and gross lewdness and lascivious behavior under *section 16 of said chapter 272*; incestuous intercourse under *section 17 of said chapter 272* involving a person under the age of 21; dissemination or possession with the intent to disseminate to a minor matter harmful to a minor under *section 28 of said chapter 272*; posing or exhibiting a child in a state of nudity under *section 29A of said chapter 272*; dissemination of visual material of a child in a state of nudity or sexual conduct under *section 29B of said chapter 272*; purchase or possession of visual material of a child depicted in sexual conduct under *section 29C of said chapter 272*; dissemination of visual material of a child in the state of nudity or in sexual conduct under *section 30D of chapter 272*; unnatural and lascivious acts with a child under the age of sixteen under the provisions of section thirty-five A of chapter two hundred and seventy-two; accosting or annoying persons of the opposite sex and lewd, wanton and lascivious speech or behavior under *section 53 of said chapter 272*; and any attempt to commit any of the above listed crimes under the provisions of section six of chapter two hundred and seventy-four or a like violation of the laws of another state, the United States or a military, territorial or Indian tribal authority; and any other offense, the facts of which, under the totality of the circumstances, manifest a sexual motivation or pattern of conduct or series of acts of sexually-motivated offenses.

"Sexually dangerous person", any person who has been (i) convicted of or adjudicated as a delinquent juvenile or youthful offender by reason of a sexual offense and who suffers from a mental abnormality or personality disorder which makes the person likely to engage in sexual offenses if not confined to a secure facility; (ii) charged with a sexual offense and was determined to be incompetent to stand trial and who suffers from a mental abnormality or personality disorder which makes such person likely to engage in sexual offenses if not confined to a secure facility; or (iii) previously adjudicated as such by a court of the commonwealth and whose misconduct in sexual matters indicates a general lack of power to control his sexual impulses, as evidenced by repetitive or compulsive sexual misconduct by either violence against any victim, or aggression against any victim under the age of 16 years, and who, as a result, is likely to attack or otherwise inflict injury on such victims because of his uncontrolled or uncontrollable desires.

HISTORY: 1947, 683; 1954, 686, § 1; 1958, 646, § 1; 1985, 752, § 1; 1993, 489, § 1; 1999, 74, §§ 3-6; 2002, 492, approved Jan 1, 2003, effective April 1, 2003; 2004, 66, §§ 1-6, declared emergency law by governor, effective April 7, 2004; 2008, 451, § 84; 2010, 267, §§ 23-28.

§ 9. Petitions for Examination and Discharge; Procedures.

Any person committed to the treatment center shall be entitled to file a petition for examination and discharge once in every twelve months. Such petition may be filed by either the committed person, his parents, spouse, issue, next of kin or any friend. The department of correction may file a petition at any time if it believes a person is no longer a sexually dangerous person. A copy of any petition filed under this subsection shall be sent within fourteen days after the filing thereof to the department of the attorney general and to the district attorney for the district where the original proceedings were commenced. Said petition shall be filed in the district of the superior court department in which said person was committed. The petitioner shall have a right to a speedy hearing on a date set by the administrative justice of the superior court department. Upon the motion of the person or upon its own motion, the court shall appoint counsel for the person. The hearing may be held in any court or any place designated for such purpose by the administrative justice of the superior court department. In any hearing held pursuant to the provisions of this section, either the petitioner or the commonwealth may demand that the issue be tried by a jury. If a jury trial is demanded, the matter shall proceed according to the practice of trial in civil cases in the superior court.

The court shall issue whatever process is necessary to assure the presence in court of the committed person. The court shall order the petitioner to be examined by two qualified examiners,

who shall conduct examinations, including personal interviews, of the person on whose behalf such petition is filed and file with the court written reports of their examinations and diagnoses, and their recommendations for the disposition of such person. Said reports shall be admissible in a hearing pursuant to this section. If such person refuses, without good cause, to be personally interviewed by a qualified examiner appointed pursuant to this section, such person shall be deemed to have waived his right to a hearing on the petition and the petition shall be dismissed upon motion filed by the commonwealth. The qualified examiners shall have access to all records of the person being examined. Evidence of the person's juvenile and adult court and probation records, psychiatric and psychological records, the department of correction's updated annual progress report of the petition, including all relevant materials prepared in connection with the section six A process, and any other evidence that tends to indicate that he is a sexually dangerous person shall be admissible in a hearing under this section. The chief administrative officer of the treatment center or his designee may testify at the hearing regarding the annual report and his recommendations for the disposition of the petition. Unless the trier of fact finds that such person remains a sexually dangerous person, it shall order such person to be discharged from the treatment center. Upon such discharge, notice shall be given to the chief administrative officer, to the commissioner of correction and the colonel of state police, to the attorney general, to the district attorney in the district from which the commitment originated, to the police department of the city or town from which the commitment originated, the police department of the town of Bridgewater, the police department where such person is anticipated to take up residency, any employer of the resident, the department of criminal justice information services, and any victim of the sexual offense from which the commitment originated; provided, however, that said victim has requested notification pursuant to section three of chapter two hundred and fifty-eight B. If such victim is deceased at the time of such discharge, notice of such discharge shall be given to the parent, spouse or other member of the immediate family of such deceased victim.

HISTORY: 1954, 686, § 1; 1958, 646, § 1; 1960, 347; 1966, 608; 1985, 752, § 1; 1987, 116; 1989, 555; 1993, 489, § 7; 1996, 151, § 282; 2010, 256, § 76.

§ 12. Notification of District Attorney and Attorney General Six Months Prior to Release of Certain Sexual Offenders; Petition Alleging that Sexual Offender is a Sexually Dangerous Person; Probable Cause Determination; Hearing.

(a) Any agency with jurisdiction of a person who has ever been convicted of or adjudicated as a delinquent juvenile or a youthful offender by reason of a sexual offense as defined in section 1, regardless of the reason for the current incarceration, confinement or commitment, or who has been charged with such offense but has been found incompetent to stand trial, or who has been charged with any offense, is currently incompetent to stand trial and has previously been convicted of or adjudicated as a delinquent juvenile or a youthful offender by reason of a sexual offense, shall notify in writing the district attorney of the county where the offense occurred and the attorney general six months prior to the release of such person, except that in the case of a person who is returned to prison for no more than six months as a result of a revocation of parole or who is committed for no more than six months, such notice shall be given as soon as practicable following such person's admission to prison. In such notice, the agency with jurisdiction shall also identify those prisoners or youths who have a particularly high likelihood of meeting the criteria for a sexually dangerous person.

(b) When the district attorney or the attorney general determines that the prisoner or youth in the custody of the department of youth services is likely to be a sexually dangerous person as defined in section 1, the district attorney or the attorney general at the request of the district attorney may file a petition alleging that the prisoner or youth is a sexually dangerous person and stating sufficient facts to support such allegation in the superior court where the prisoner or youth is committed or in the superior court of the county where the sexual offense occurred.

(c) Upon the filing of a petition under this section, the court in which the petition was filed shall determine whether probable cause exists to believe that the person named in the petition is a

sexually dangerous person. Such person shall be provided with notice of, and an opportunity to appear in person at, a hearing to contest probable cause.

(d) At the probable cause hearing, the person named in the petition shall have the following rights:

(1) to be represented by counsel;

(2) to present evidence on such person's behalf;

(3) to cross-examine witnesses who testify against such person; and

(4) to view and copy all petitions and reports in the court file.

(e) If the person named in the petition is scheduled to be released from jail, house of correction, prison or a facility of the department of youth services at any time prior to the court's probable cause determination, the court, upon a sufficient showing based on the evidence before the court at that time, may temporarily commit such person to the treatment center pending disposition of the petition. The person named in the petition may move the court for relief from such temporary commitment at any time prior to the probable cause determination.

HISTORY: 1999, 74, § 8; 2004, 66, §§ 7-9, declared emergency law by governor, effective April 7, 2004.

CONSTITUTION OF THE UNITED STATES OF AMERICA
AMENDMENTS
AMENDMENT 14

Sec. 1. [Citizens of the United States.]

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Article XI.

Every subject of the commonwealth ought to find a certain remedy, by having recourse to the laws, for all injuries or wrongs which he may receive in his person, property, or character. He ought to obtain right and justice freely, and without being obliged to purchase it; completely, and without any denial; promptly, and without delay; conformably to the laws.

Article XXIX.

It is essential to the preservation of the rights of every individual, his life, liberty, property, and character, that there be an impartial interpretation of the laws, and administration of justice. It is the right of every citizen to be tried by judges as free, impartial and independent as the lot of humanity will admit. It is, therefore, not only the best policy, but for the security of the rights of the people, and of every citizen, that the judges of the supreme judicial court should hold their offices as long as they behave themselves well; and that they should have honorable salaries ascertained and established by standing laws.

Article XXX.

In the government of this commonwealth, the legislative department shall never exercise the executive and judicial powers, or either of them: the executive shall never exercise the legislative and judicial powers, or either of them: the judicial shall never exercise the legislative and executive powers, or either of them: to the end it may be a government of laws and not of men.

Rule 61: Harmless Error

No error in either the admission or the exclusion of evidence and no error or defect in any ruling or order or in anything done or omitted by the court or by any of the parties is ground for granting a new trial or for setting aside a verdict or for vacating, modifying or otherwise disturbing a judgment or order, unless refusal to take such action appears to the court inconsistent with substantial justice. The court at every stage of the proceeding must disregard any error or defect in the proceeding which does not affect the substantial rights of the parties.

Effective July 1, 1974.

Reporter's Notes (1973): Federal Rule 61 is adopted without change. It is declarative of existing Massachusetts law as expressed in former G.L. c. 231, §§ 132 and 144 and in the decided cases. See, e.g., Runshaw v. Bernstein, 347 Mass. 405, 407-408, 198 N.E.2d 293, 295-296 (1964).

Reporter's Notes (1996): With the merger of the District Court rules into the Mass.R.Civ.P., minor differences which had existed between Mass.R.Civ.P. 61 and Dist./Mun.Cts.R.Civ.P. 61 have been eliminated.

APPENDIX

Commonwealth of Massachusetts
SUFFOLK SUPERIOR COURT
Case Summary
Criminal Docket

IN RE: Green, James

Details for Docket: SUCR2011-10838

Case Information

Docket Number:	SUCR2011-10838	**Caption:**	IN RE: Green, James
Entry Date:	08/11/2011	**Case Status:**	Criminal 8 Ctrm 914
Status Date:	07/20/2015	**Session:**	Disposed: Appeal Assembled
Lead Case:	NA	**Deadline Status:**	
Trial Deadline:		**Jury Trial:**	NO

Parties Involved

3 Parties Involved in Docket: SUCR2011-10838

Party Involved:		**Role:**	Active
Last Name:	Green	**First Name:**	James
Address:	Massachusetts Treatment Center	**Address:**	30 Administration Road
City:	Bridgewater	**State:**	MA
Zip Code:	02324	**Zip Ext:**	
Telephone:			

Party Involved:		**Role:**	Complainant
Last Name:	Mass	**First Name:**	Comm of
Address:		**Address:**	
City:		**State:**	
Zip Code:		**Zip Ext:**	
Telephone:			

Party Involved:		**Role:**	Petitioner
Last Name:	Green	**First Name:**	James
Address:	Massachusetts Treatment Center	**Address:**	30 Administration Road
City:	Bridgewater	**State:**	MA
Zip Code:	02324	**Zip Ext:**	

Telephone:

Attorneys Involved

4 Attorneys Involved for Docket: SUCR2011-10838

Attorney Involved:		**Firm Name:**	
Last Name:	Schmidt	**First Name:**	Sondra H
Address:	726 Jerusalem Road	**Address:**	
City:	Cohasset	**State:**	MA
Zip Code:	02025	**Zip Ext:**	0174
Telephone:	781-383-1245	**Tel Ext:**	
Fascimile:	781-383-8765	**Representing:**	Green, James (Petitioner)

Attorney Involved:		**Firm Name:**	MA143
Last Name:	Coyne	**First Name:**	Sabine M.
Address:	30 Administration Road	**Address:**	
City:	Bridgewater	**State:**	MA
Zip Code:	02324	**Zip Ext:**	
Telephone:	508-279-8100	**Tel Ext:**	
Fascimile:	508-279-8181	**Representing:**	Mass, Comm of (Complainant)

Attorney Involved:		**Firm Name:**	MA14
Last Name:	Murray	**First Name:**	Mary P
Address:	30 Administration Road	**Address:**	Legal Department
City:	Bridgewater	**State:**	MA
Zip Code:	02324	**Zip Ext:**	
Telephone:	508-279-8184	**Tel Ext:**	
Fascimile:	508-279-8181	**Representing:**	Mass, Comm of (Complainant)

Attorney Involved:		**Firm Name:**	
Last Name:	Nam-Krane	**First Name:**	Michael A
Address:	P. O. Box 301218	**Address:**	
City:	Boston	**State:**	MA
Zip Code:	02130	**Zip Ext:**	0011
Telephone:	617-553-2366	**Tel Ext:**	

Fascimile: 617-553-2366 **Representing:** Green, James (Petitioner)

Calendar Events

11 Calendar Events for Docket: SUCR2011-10838

No.	Event Date:	Event Time:	Calendar Event:	SES:	Event Status:
1	03/09/2015	09:00	TRIAL: S.D.P.	8	Event rescheduled by court order
2	03/10/2015	09:00	Hearing: Motion(s) in Limine	8	Event held as scheduled
3	03/11/2015	09:00	TRIAL: S.D.P.	8	Trial begins
4	03/12/2015	09:00	TRIAL: S.D.P.	8	Event continues over multiple days
5	03/13/2015	09:00	TRIAL: S.D.P.	8	Event continues over multiple days
6	03/16/2015	09:00	TRIAL: S.D.P.	8	Event continues over multiple days
7	03/17/2015	09:00	TRIAL: S.D.P.	8	Event continues over multiple days
8	03/18/2015	09:00	TRIAL: S.D.P.	8	Trial ends
9	03/23/2015	09:00	Hearing: Post-Sentence	8	Event held as scheduled
10	03/25/2015	09:00	Hearing: Post-Sentence	8	Event held as scheduled
11	04/03/2015	09:00	Hearing: Post-Sentence	8	Event held as scheduled

Full Docket Entries

207 Docket Entries for Docket: SUCR2011-10838

Entry Date:	Paper No:	Docket Entry:
08/11/2011	1	Petition for release & discharge received from Plymouth County
08/11/2011	1	Superior Court for hearing only per standing order of the Court
08/11/2011		Affidavit of Indigency and Request for waiver substition or state
08/11/2011		payment of fees and costs filed without Supplemental affidavit
11/15/2011		Appointment of Counsel Sondra H Schmidt, pursuant to Rule 53
05/30/2014	2	Commonwealth files Jury demand
08/28/2014	3	Discovery Order, filed MacLeod, J
08/28/2014	4	Scheduling Order, filed MacLeod, J
11/17/2014	5	Petitioner files Ex Parte Motion for funds for two expert witnesses
11/17/2014	5	and for access to Petitioner's unredacted records for counsel and his
11/17/2014	5	experts
11/18/2014		MOTION (P#5) allowed in the amount not to exceed $4000.00 per
11/18/2014		examiner. Access to unredacted records is allowed. (Garry V. Inge,
11/18/2014		Justice)
02/25/2015	6	Commonwealth files Proposed witness list
02/25/2015	7	Commonwealth files Notice of intent to present expert witnesses
03/03/2015	8	Commonwealth files Motion in limine to exclude results of PPG and

03/03/2015	8	"adjunct psychological testing or in the alternative for supplemental
03/03/2015	8	discovery in anticipation of a daubert/lanigan hearing on
03/03/2015	8	admissibility
03/04/2015	9	Commonwealth files Proposed statement of the case
03/04/2015	10	Commonwealth files Motion for voir dire
03/04/2015	11	Commonwealth files Motion in limine to exclude certain evidence
03/04/2015	11	concerning the adeqaucy of the Petitioner's treatment and/or
03/04/2015	11	conditions of his confinement
03/04/2015	12	Commonwealth files Motion in limine to exclude jury instruction on
03/04/2015	12	presumption of not being sexually dangerous
03/04/2015	13	Commonwealth files Motion in limine to exclude from evidence
03/04/2015	13	references to published material and recidivism statisitcs
03/04/2015	14	Commonwealth files Motion in limine regarding expert testimony from
03/04/2015	14	psychologist members of the Community Access Board
03/04/2015	15	Commonwealth files Proposed jury instructions
03/04/2015	16	Commonwealth files Supplemental motion in limine to exclude results
03/04/2015	16	of the abel assessment sexual interest
03/05/2015	17	Petitioner files Opposition to Commonwealth's motion to exclude
03/05/2015	17	results of PPG
03/05/2015	18	Petitioner files List of potential witnesses
03/05/2015	19	Petitioner files Suggested revisions to Commonwealth's proposed
03/05/2015	19	statement of the case
03/05/2015	20	Petitioner files Motion in limine to exclude reference to deviant
03/05/2015	20	arousal from testimony exhibits and arguments
03/05/2015	21	Petitioner files Motion in limine to exclude charges/allegation not
03/05/2015	21	resulting in conviction
03/05/2015	22	Petitioner files Motion regarding admissibility of passages in
03/05/2015	22	professional journals books and research articles with regard to
03/05/2015	22	recidivism statisitcs
03/05/2015	23	Petitioner files Motion in limine to exclude docket entries and other
03/05/2015	23	extraneous and/or prejudicial conviction documents
03/05/2015	24	Petitioner files Motionn in limine to exclude certain questions
03/05/2015	24	regarding the reports and testimony of independent experts
03/05/2015	25	Petitioner files Motion in limine to exclude reference to stable 2007
03/05/2015	26	Petitioner files Opposition to commonwealth's motion in limine to
03/05/2015	26	exclude from evidence references to published material and recidivism
03/05/2015	26	statisitics
03/05/2015	27	Petitioner files Opposition to commonwealth's motion in limine to
03/05/2015	27	exclude from evidence references to published material and recidivism
03/05/2015	27	statisitics
03/05/2015	28	Petitioner files Opposition to commonwealth's motion in limine to
03/05/2015	28	exclude certain evidence concerning the adequacy of the Petitioner's

03/05/2015	28	treatment and/or conditions of his confinement
03/05/2015	29	Petitioner files Motion in limine to exclude all reference to
03/05/2015	29	Petitioner's right to file present or subsequent petitions and/or
03/05/2015	29	reference to prior section 9 hearings
03/05/2015	30	Petitioner files Motion in limine to exclude use of phrase, "Remains
03/05/2015	30	Sexually Dangerous"
03/05/2015	31	Petitioner files Motion for jury instruction Re: Presumption of not
03/05/2015	31	sexually dangerous
03/05/2015	32	Petitioner files Request for additional language in the Court's
03/05/2015	32	charge to the jury with regard to past sexual misconduct in the
03/05/2015	32	"likely" section of the charge
03/05/2015	33	Petitioner files Request for special jury instruction
03/05/2015	34	Petitioner files Proposed jury instructions
03/05/2015	35	Petitioner files Request to exclude language from charge regarding
03/05/2015	35	more likely than not
03/05/2015	36	Petitioner files Request for special jury instruction prior to
03/05/2015	36	Community Access Board representative's testimony
03/05/2015	37	Petitioner files Proposed balancing additional jury instructions
03/05/2015	38	Petitioner files Request for additional jury instruction regarding
03/05/2015	38	Community Transition Program
03/05/2015	39	Petitioner files Motion to exclude non-convictions mention of
03/05/2015	39	previous qualified examiners section 9 proceedings and other objected
03/05/2015	39	to testimony/passages as noted in appended copies of reports
03/09/2015	40	Commonwealth files Opposition to Petitioner's motion in limine to
03/09/2015	40	exclude certain questions regarding the reports and testimony of
03/09/2015	40	Petitioner's experts
03/09/2015	41	Commonwealth files Request to submit reply memo in support of motion
03/09/2015	41	to exclude PPG and reply memo
03/10/2015		Petitioner brought into court. Hearing Re: Motions
03/10/2015		After hearing MOTION (P#30) denied (Laurence D. Pierce, Justice)
03/10/2015		MOTION (P#29) allowed without opposition (Laurence D. Pierce, Justice)
03/10/2015		MOTION (P#11) allowed (Laurence D. Pierce, Justice)
03/10/2015		MOTION (P#13) denied (Laurence D. Pierce, Justice)
03/10/2015		MOTION (P#26) denied (Laurence D. Pierce, Justice)
03/10/2015		MOTION (P#27) denied (Laurence D. Pierce, Justice)
03/10/2015		MOTION (P#24) allowed in part and denied in part (See Record)
03/10/2015		(Laurence D. Pierce, Justice).
03/10/2015		MOTION (P#20) denied (Laurence D. Pierce, Justice)
03/10/2015		MOTION (P#23) No action taken at this time. Pierce, J
03/10/2015		MOTION (P#21) No action taken at this time. Pierce, J
03/10/2015		MOTION (P#39) No action taken at this time. Pierce, J
03/10/2015		MOTION (P#16) Moot. Pierce, J

03/10/2015		MOTION (P#8) allowed (Laurence D. Pierce, Justice)
03/10/2015		Case continued to 3/11/15 for impanelment. Pierce, J., S. Coyne,
03/10/2015		AAG., S. Schmidt, Atty., W. Greenlaw, Court Reporter
03/11/2015		Petitioner brought into court
03/11/2015		The Court order Fourteen (14) jurors impaneled. Twelve (12) jurors
03/11/2015		impaneled.Pierce, J., S. Coyne, AAG., S. Schmidt, Atty., W. Greenlaw,
03/11/2015		Court Reporter
03/11/2015	42	Petitioner files Motion
03/12/2015		Petitioner brought into court
03/12/2015		Impanelement continues. Juror in seat #8 E. H. dismissed.
03/12/2015		After hearing MOTION (P#42) allowed (Laurence D. Pierce, Justice)
03/12/2015		Hearing Re: Motion Paper #42.
03/12/2015		Jurors sworn. Trial with Thirteen (13) jurors present begins before
03/12/2015		Pierce, J., S. Coyne, AAG., S. Schmidt, Atty., W. Greenlaw, Court
03/12/2015		Reporter
03/13/2015		Petitioner brought into court
03/13/2015		Trial with Thirteen (13) jurors present continues before Pierce, J
03/13/2015		Commonwealth rests
03/13/2015	43	Petitioner's Motion for a directed verdict filed and denied after
03/13/2015	43	hearing. Pierce, J., S. Coyne, AAG., S. Schmidt, Atty., JAVS (ERD)
03/16/2015	44	Petitioner files Ex Parte Motion for additional funds to compensate
03/16/2015	44	Dr. Joseph J. Plaud, Ph.D
03/16/2015		Petitioner brought into court
03/16/2015		Trial with Thirteen (13) jurors present continues before Pierce, J
03/16/2015		Petitioner rests
03/16/2015		Petitioner's Renewed Oral Motion for a directed verdict made and
03/16/2015		denied after hearing. Pierce, J
03/16/2015		Charge conference held
03/16/2015		MOTION (P#12) denied (Laurence D. Pierce, Justice)
03/16/2015		MOTION (P#14) denied (Laurence D. Pierce, Justice)
03/16/2015		MOTION (P#37) denied Pierce, J., S. Coyne, AAG., S. Schmidt, Atty.,
03/16/2015		W. Greenlaw, Court Reporter
03/17/2015		Petitioner brought into court
03/17/2015		Trial with Thirteen (13) jurors present continues before Pierce, J
03/17/2015		At the final submission of the case to the jury the Court appoints
03/17/2015		Juror #169 B.R. in seat #1 as foreperson of the jury
03/17/2015		After in spection both parties are satisified with the exhibits and
03/17/2015		verdict slip
03/17/2015		Deliberations begin with Thirteen (13) jurors present
03/17/2015		Jurors allowed to seperate and reconvene on Wednesday 3/18/15 for
03/17/2015		further deliberations. Pierce, J., S. Coyne, AAG., S. Schmidt, Atty.,
03/17/2015		W. Greenlaw, Court Reporter

03/18/2015		Petitioner brought into court
03/18/2015		Deliberations continue with Thirteen (13) jurors present
03/18/2015		Question from jury marked "L" for ID
03/18/2015		SDP: Verdict returned Petitioner no longer a sexually dangereous
03/18/2015		person
03/18/2015	45	Verdict affirmed, verdict slip filed. Commonwealth's oral motion for
03/18/2015	45	stay allowed until Monday 3/23/15 for further hearing. MacLeod, J.,
03/18/2015	45	S. Coyne, AAG., S. Schmidt, Atty., W. Greenlaw, Court Reporter
03/23/2015	46	Commonwealth files Motion for a new trial or in the alternative for
03/23/2015	46	stay of discharge order pending appeal
03/23/2015	47	Petitioner files Oppostion to Commonwealth's motion for a new trial
03/23/2015	47	or in the alternative a discharge order pending appeal
03/23/2015		Petitioner brought into court. Hearing Re: Motion Paper #46
03/23/2015		After hearing Motion Paper #46 Motion for new trial denied and motion
03/23/2015		to stay continued to 3/25/15 at 9:00. Pierce, J., S. Coyne, AAG., S.
03/23/2015		Schmidt, Atty., W.Greenlaw, Court Reporter
03/25/2015	48	Commonwealth files Supplemental memorandum in support of Motion for
03/25/2015	48	a new trial or in the alternative for stay of discharge order pending
03/25/2015	48	appeal
03/25/2015	49	Petitioner files Production of documentation requested by pertaining
03/25/2015	49	to Petitioner's release
03/25/2015		Petitioner brought into court. Status hearing held before Pierce, J
03/25/2015		Re: Discharge status. Discharge is stayed until further hearing is
03/25/2015		determined. Pierce, J ., S. Coyne, AAG., S. Schmidt, Atty.,
03/25/2015		W.Greenlaw, Court Reporter
03/31/2015	50	Appearance of Commonwealth's Atty: Mary Murray
03/31/2015	51	Commonwealth files Response to Petitioner's further production of
03/31/2015	51	documentation
04/03/2015	52	Appearance of Petitioner's Atty: Michael A Nam-Krane
04/03/2015		Petitioner brought into court. Hearing Re: Petitioner's discharge
04/03/2015		After hearing the Petitioner is ordered discharged from the Mass
04/03/2015		Treatment Center on 4/8/15 pending the Commonwealth's appeal. Pierce,
04/03/2015		J., S. Coyne and M. Murray, AAG., S. Schmidt and M. Nam-Krane,
04/03/2015		Atty., W. Greenlaw, Court Reporter
04/03/2015	53	NOTICE of APPEAL FILED by Comm of Mass
04/03/2015	54	Order on Commonwealth's motion for a new trial or in the alternative
04/03/2015	54	for a stay of discharge order pending appeal, filed Pierce, J
04/06/2015		Appointment of Counsel Michael A Nam-Krane, pursuant to Rule 53
04/06/2015	55	Commonwealth files Motion to assemble the record
04/06/2015		MOTION (P#55) allowed Pierce, J
04/08/2015	56	Notice of docket entry received from the Appeals Court. Order: The
04/08/2015	56	Petitioner shall file a response to the Commonwealth's motion on or

04/08/2015	56	before 4/13/15. The order discharging the Petitioner is stayed
04/08/2015	56	pending receipt of the Petitioner's oppostition and final disposition
04/08/2015	56	on the Commonwealth's motion. (Green, J) Notice/Attest/Pierce, J
04/10/2015	57	Notice of docket entry received from the Appeals Court (See Paper #57)
04/10/2015	58	Petitioner files Motion for expedited transcripts
04/13/2015	59	Notice of transcript order and designation of record on appeal filed
04/13/2015	59	by the Commonwealth
04/16/2015		MOTION (P#58) allowed Pierce, J
05/13/2015	60	Notice of docket entry received from the Appeals Court. Case was
05/13/2015	60	entered in this Court on 5/1/15
07/20/2015		Notice of completion of assembly of record sent to clerk of Appeals
07/20/2015		Court and attorneys for the Commonwealth and defendant.
07/20/2015		Two (2) certified copies of docket entries, and copy of the notice of
07/20/2015		appeal(Paper #53), Commonwealth's Motion for a New Trial or in the
07/20/2015		Alternative for Stay of Discharge Order Pending Appeal(Paper #46).
07/20/2015		Supplemental Memorandum in Support of Commonwealth's for a New Trial
07/20/2015		or. In the Alternative, For a Stay of Discharge pending Appeal (Paper
07/20/2015		#48). Order on Commonwealth's Motion for a New Trial or, in the
07/20/2015		Alternative, for a Stay of Discharge Order Pending Appeal(Paper #54)
07/20/2015		each transmitted to clerk of appellate court.
09/01/2015	61	Petitioner files Ex Parte Motion to scan exhibits or for free copies
09/01/2015		MOTION (P#61) allowed (Bonnie H. MacLeod)

Charges

No Charges found for Docket: SUCR2011-10838.

There are currently no charges associated with this case.

APPEALS COURT
Single Justice
Case Docket

JAMES GREEN vs. COMMONWEALTH
2015-J-0133

CASE HEADER

Case Status	Disposed: Case Closed	**Status Date**	04/07/2015
Nature	Motion for MRAP 6(a) stay	**Entry Date**	04/06/2015
Pet Role Below	Defendant	**Single Justice**	Green, J.
Brief Status		**Brief Due**	
Case Type	Civil	**Lower Ct Number**	SUCR2011-10838
Lower Court	Suffolk Superior Court	**Lower Ct Judge**	Laurence D. Pierce, J.

INVOLVED PARTY	ATTORNEY APPEARANCE
James Green Plaintiff/Respondent	Michael A. Nam-Krane, Esquire Sondra H. Schmidt, Esquire
Commonwealth Defendant/Petitioner	Mary P. Murray, Esquire

DOCKET ENTRIES

Entry Date	Paper	Entry Text
04/06/2015	#1	Motion for stay under M.R.A.P. 6(a) with attachments, filed by Commonwealth.
04/06/2015		ORDER: The petitioner shall file a response to the Commonwealth's motion on or before 4/13/15. The order discharging the petitioner is stayed pending receipt of the petitioner's opposition and final disposition on the Commonwealth's motion.(Green, J.). *Notice/Attest/Pierce, J.
04/06/2015	#2	Opposition to Motion to Stay, filed by James Green^
04/07/2015	#3	ORDER: Before me is the Commonwealth's motion to stay the petitioner's release from custody, pending resolution of the Commonwealth's appeal from a judgment entered on the jury's verdict that the petitioner is not sexually dangerous. Upon review of the materials submitted by the Commonwealth with its motion, and the petitioner's opposition, the Commonwealth's motion is ALLOWED. As the Commonwealth observes in support of its motion, the jury instruction in the petitioner's case carried essentially the same error identified in Souza, petitioner, 87 Mass. App. Ct. 162, 172-173 (2014). The Commonwealth accordingly has demonstrated that its appeal raises issues worthy of appellate consideration. Furthermore, in its motion the Commonwealth persuasively articulates public safety concerns flowing from denial of the requested stay. In his opposition, the petitioner points to the denial of a stay requested by the Commonwealth in Souza, petitioner, supra. However, the circumstances in Souza are different from those in the present case in at least two significant respects. First, in Souza the error in the jury instruction had not been established.[1] Second, the trial judge in Souza imposed conditions on the petitioner's release (including GPS monitoring) designed to mitigate the public safety risk and risk of flight arising from the petitioner's release, which the single justice had before him for review. In the present case, by contrast, the trial judge imposed no conditions on the petitioner's release.[2] (Green, J.). Notice/attest/Pierce, J. Footnotes [1] Though the petitioner in Souza has filed an application for further appellate review which remains pending, it is good law unless and until the Supreme Judicial Court grants further appellate review and vacates its holding. In any event, I note that the dissent in Souza was directed to the sufficiency of the evidence, and not the propriety of the jury instruction, and I find persuasive the opinion's explanation of the error in the jury instruction. [2] I decline the petitioner's invitation to impose "appropriate conditions" on the petitioner's release, in the first instance, as an alternative to allowing the Commonwealth's motion for a stay.

04/21/2015	#4	Notice of appeal, filed by James Green. ^
04/29/2015		Copy of paper #4 to counsel.
04/29/2015	#5	Notice of Assembly of the Record to counsel.
04/29/2015		Memo: single justice file with assembly.
05/07/2015		Memo: Panel case entered as 2015-P-0616.

As of 05/07/2015 20:00

COMMONWEALTH OF MASSACHUSETTS

PLYMOUTH, ss.
[Unified Session at Suffolk]

SUPERIOR COURT DEPARTMENT
OF THE TRIAL COURT
UNIFIED SESSION NO.
SUCR2011-10838 (SDP)

JAMES GREEN,
Petitioner,

v.

COMMONWEALTH,
Respondent.

COMMONWEALTH'S MOTION IN LIMINE REGARDING EXPERT TESTIMONY FROM PSYCHOLOGIST MEMBERS OF THE COMMUNITY ACCESS BOARD

It is the Commonwealth's understanding that the Court gives a limiting instruction regarding the weight that the jury may give to the opinions of psychologist members of the Community Access Board ("CAB"), when these psychologists are called to testify by the Commonwealth. The Commonwealth respectfully submits that such an instruction is an impermissible intrusion on the jury's exclusive province of weighing and crediting evidence. The Commonwealth thus moves the Court to refrain from giving such an instruction.

The Court's proposed limiting instruction well beyond the holding in *Johnstone, petitioner*, 453 Mass. 544 (2009), and is contrary to settled law. Nothing in *Johnstone* authorizes the instruction proposed by this Court. If the SJC had intended to so limit the CAB, they would have specifically said so. Instead, the SJC held that the qualified examiners perform a "gatekeeper" function in SDP trials. *See Johnstone*, 453 Mass. at 553. Once the Commonwealth presents evidence of a petitioner's sexual dangerousness through one qualified examiner, the

Commonwealth is then permitted to present further expert evidence through other experts, including expert psychologist member of the CAB.

This conclusion is supported by the SJC's decisions in *Commonwealth v. Blake,* 454 Mass. 267, 275 (2009), and *Commonwealth v. Cowen,* 452 Mass. 757, 762 (2008). In these cases, the SJC provides that expert evidence, properly admitted to the trier of fact, may be used to support a finding of sexual dangerousness, even if that evidence does not come from a qualified examiner. Notably, these decisions were issued just before and just after *Johnstone. Cowen* was decided four months before *Johnstone* and *Blake* was decided three months after *Johnstone*. In *Blake*, the Commonwealth presented testimony from one qualified examiner and from the probable cause expert retained by the District Attorney, who is a qualified examiner but was not testifying in that capacity. 454 Mass. at 270. Blake claimed that the Commonwealth lacked statutory authority to present an expert witness other than one who has been designated by the court as a qualified examiner. The Court held that this issue was considered and settled in *Commonwealth v. Cowen,* 452 Mass. 757, 762 (2008). *Blake,* 454 Mass. at 275.

In *Cowen,* the testimony of the probable cause expert was sufficient to support a SDP verdict. In rejecting Cowen's argument that the probable cause expert's testimony was deserving of little weight, and was insufficient to support a verdict, the SJC held, "This argument is unpersuasive. We reject the defendant's suggestion that [the probable cause expert's] testimony, even though admissible, deserved very little or no weight. The matter of how much weight is to be given a witness, particularly an expert witness, is a matter for the trier of fact, not an appellate court." *Cowen,* 452 Mass. at 762.

3

Cowen and *Blake* reiterated the well-established body of law that the weighing of the evidence and assessment of credibility is the exclusive province and classic function of the jury. *See, e.g., Commonwealth v. Walsh,* 376 Mass. 53, 60 (1978). The Court's proposed limiting instruction regarding the testimony of an expert psychologist member of the CAB constitutes an an impermissible intrusion on the jury's sole province of weighing and crediting the evidence.

As with any expert, it is psychologist's qualifications, and not the fact of membership on the CAB, that is relevant in determining the weight to be accorded to the opinion. *See, e.g., McLaughlin v. Board of Selectmen,* 422 Mass. 359, 363 (1996) (each expert should be qualified individually "with their relative qualifications going to the weight of their testimony"). In this case, the CAB psychologist is also a qualified examiner and has offered expert opinion on sexual dangerousness before this Court and many others. He has had access to the same records as the qualified examiners and petitioner's experts, forming a professional opinion based on his training, education and experience. The evaluation of his credibility and the weight to be given his opinion, as with any expert, is for the jury.

To the extent that any part of the instruction is based on the Appeals Court's analysis in *Johnstone*, it is important to bear in mind that the Appeals Court's decision in *Johnstone* has never issued. Because the SJC granted the Commonwealth's application for further appellate review, *see In re Johnstone,* 452 Mass. 1103 (2008), the Appeals Court never issues the rescript of its decision. *See* Mass. R. App. P. 23; *Commonwealth v. Aboulaz*, 44 Mass. App. Ct. 144, 148 (1998). The SJC's opinion is the relevant appellate opinion in *Johnstone*. *See In re Baylis*, 217 F.3d 66, 71 n. 3 (1st Cir. 2000).

CONCLUSION

The Commonwealth requests that the Court not give any limiting instruction regarding the weight that the jury may give to any testifying expert.

Respectfully Submitted
by the Commonwealth

NANCY ANKERS WHITE
Special Assistant Attorney General

Sabine M. Coyne
Massachusetts Department of Correction
Massachusetts Treatment Center
30 Administration Road
Bridgewater, MA 02324
(508) 279-8147
scoyne@doc.state.ma.us

Dated: March 3, 2015

CERTIFICATE OF SERVICE

I hereby certify that I did this day serve a photocopy of the above document upon the petitioner by email via his attorney of record, Sondra H. Schmidt.

Sabine M. Coyne

Dated: March 3, 2015

COMMONWEALTH OF MASSACHUSETTS

PLYMOUTH, ss.
[Unified Session at Suffolk]

SUPERIOR COURT DEPARTMENT
OF THE TRIAL COURT
UNIFIED SESSION NO.
SUCR2011-10838 (SDP)

JAMES GREEN,
Petitioner,

v.

COMMONWEALTH,
Respondent.

COMMONWEALTH'S MOTION FOR A NEW TRIAL OR, IN THE ALTERNATIVE, FOR STAY OF DISCHARGE ORDER PENDING APPEAL

The Commonwealth submits this motion for a new trial or, in the alternative, for a stay of discharge order pending appeal or until March 30, 2015, to permit the Commonwealth to seek a stay from the appellate courts. As grounds for this motion, the Commonwealth relies on the memorandum of law submitted herewith.

Respectfully Submitted
by the Commonwealth

NANCY ANKERS WHITE
Special Assistant Attorney General

by: Sabine M Coyne (by mw)
Sabine M. Coyne, Counsel
BBO #632968
Department of Correction
Massachusetts Treatment Center
30 Administration Road
Bridgewater, Massachusetts 02324
(508) 279-8147

Dated: March 20, 2015

CERTIFICATE OF SERVICE

I hereby certify that I served a copy of this document upon the petitioner's counsel, Sondra Schmidt, via email.

Mary P. Murray

Dated: March 20, 2015

COMMONWEALTH OF MASSACHUSETTS

PLYMOUTH, ss.
[Unified Session at Suffolk]

SUPERIOR COURT DEPARTMENT
OF THE TRIAL COURT
UNIFIED SESSION NO.
SUCR2011-10838 (SDP)

JAMES GREEN,
Petitioner,

v.

COMMONWEALTH,
Respondent.

COMMONWEALTH'S MEMORANDUM IN SUPPORT OF ITS MOTION FOR A NEW TRIAL OR, IN THE ALTERNATIVE, FOR STAY OF DISCHARGE ORDER PENDING APPEAL

The Commonwealth submits this memorandum in support of its motion for a new trial or, in the alternative, to stay the discharge order pending appeal or until March 30, 2015,to permit the Commonwealth to seek a stay from the appellate courts.

PROCEDURAL AND FACTUAL HISTORY

Pursuant to G.L. c. 123A, § 9, Petitioner James Green filed a petition for discharge from his commitment as a sexually dangerous person (SDP), to the Massachusetts Treatment Center (Treatment Center"). Green was found to be an SDP in July 2011. See Trial Exhibit 3. The next month, he filed this petition for discharge. See Docket. On March 11, 2015, a jury trial commenced before Pierce, J., in Suffolk Superior Court. See Docket.

The Commonwealth presented its case through the testimony and report of Qualified Examiner (QE) Nancy Connolly, Psy.D., who opined that Green remained sexually dangerous.[1] The Commonwealth also offered the testimony and report of Angela Johnson, Psy.D., who

[1] Dr. Connolly's report was admitted in evidence as Trial Exhibit 4.

testified on behalf of the Community Access Board (CAB).[2] *See* G.L. c. 123A, § 6A. Without objection, Dr. Johnson offered the CAB's unanimous opinion that Green remains sexually dangerous and the bases for this opinion.

After the Commonwealth rested, Green moved for a directed verdict, which the Court denied. See Docket. On March 16, 2015, Green renewed his motion for a directed verdict, which was also denied. See Docket. On March 17, counsel presented their closing arguments and the Court gave its final instructions to the jury. Over the Commonwealth's objection, the Court instructed the jury:

> In order to find Mr. Green is a sexually dangerous person, you must credit the opinion of Dr. Nancy Connolly who testified in her capacity as a Qualified Examiner and opined that Mr. Green is a sexually dangerous person as defined in the law at the present time. It is not required that you accept all of the reasons given by Dr. Connolly for her opinion; you may find support for the opinion anywhere in the evidence, including the testimony of Dr. Angela Johnson[,] the CAB representative. However, you cannot find that Mr. Green is a sexually dangerous person today unless you credit the opinion of Dr. Connolly that Mr. Green suffers from a mental condition that causes him serious difficulty in controlling his sexual impulses at the present time.[3]

The jury did not reach a verdict and returned the next day to continue deliberations.

While the jury was deliberating on March 18, the Appeals Court issued its opinion in *Souza, petitioner*, __ Mass. App. Ct. __, 2015 WL 1214608 (a copy of which is attached as Ex. 1). The Commonwealth made an oral motion requesting the court to reinstruct the deliberating jury in accordance with the *Souza* decision. The Court denied the Commonwealth's motion.

---

2 The CAB report was admitted in evidence as Trial Exhibit 7.

3 See Draft Charge.

Later that day, the jury returned its verdict that Green is no longer sexually dangerous. The Commonwealth moved orally to stay Green's discharge pending the Commonwealth's appeal. The Court (MacLeod, J.)[4] ordered Green to be discharged on March 23, 2015.

ARGUMENT

I. THE COURT SHOULD ALLOW THE MOTION FOR A NEW TRIAL.

The Court should allow the motion for a new trial because the jury's verdict is predicated on a legally incorrect instruction. "The decision to grant or deny a motion for a new trial rests in the discretion of the trial judge, and an appellate court will not vacate such an order unless the judge has abused that discretion." *Kassis v. Lease and Rental Management Corp.*, 79 Mass. App. Ct. 784, 787 (2011) (citing *Oliver Tripp Co. v. American Hoechst Corp.*, 34 Mass. App. Ct. 744, 748 (1993)). *See CBI Partners Limited Partnership v. Town of Chatham*, 41 Mass. App. Ct. 923, 926-27 (1996) ("An appellate court will not reverse a lower court's denial of a new trial motion absent an error of law or an abuse of discretion."). "A judge acts within his discretionary authority in granting a new trial when he does so upon a 'proper determination that his instructions to the jury were prejudicially incorrect.'" *Kassis*, 79 Mass. App. Ct. at 788 (citing *Galvin v. Welsh Mfg. Co.*, 382 Mass. 340, 343 (1981)).

An incorrect instruction warrants the grant of a new trial. "It is 'sufficient to justify a trial judge's determination to grant a new trial for defects in his jury instructions, if an appellate court would have reversed the judgment had those instructions been properly challenged on appeal." *Galvin*, 382 Mass. at 345. "Our inquiry, accordingly, is whether the original instructions were erroneous as a matter of law, and, if so, whether the result in the first trial might have been

4 Judge MacLeod was standing in for Judge Pierce.

different absent the error." *Kassis*, 79 Mass. App. Ct. at 788 (citing *Masingill v. EMC Corp.*, 449 Mass. 532, 540 n. 20 (2007)).

This Court erred in instructing the jury, based on an incorrect reading of *Johnstone, petitioner*, 453 Mass. 544, 553 (2009). As the Appeals Court stated when reviewing a similar instruction in *Souza*:

> We agree with the Commonwealth that such an instruction is not compelled by Johnstone, and that **it is otherwise inadvisable**. Johnstone held only that the Commonwealth cannot continue to pursue SDP confinement of someone unless at least one of the two assigned QEs concludes that the person is an SDP. [citation omitted]. That precondition was satisfied here. As the judge herself recognized, in determining whether someone is an SDP, jurors are not precluded from relying on evidence from non-QE sources. The judge's efforts to acknowledge this to the jury, while still trying to create a special evidentiary role for the QE, led to an instruction that was confusing at best and **not a fair statement of the law**. Where, as here, the gatekeeping role served by QEs has been satisfied, and the Commonwealth offers additional expert testimony, **a trial judge should refrain from suggesting the relative weight the jury can or should assign to the various Commonwealth experts.**

Souza at *7 (emphasis added).[5] *See also Young, petitioner*, Memorandum and Order Pursuant to Rule 1:28, 83 Mass. App. Ct. 1137, 2013 WL 3064445 *2 (attached as Ex. 2) (noting that (1) "*Johnstone* does not by its terms address the degree to which a jury must credit the testimony at trial of a QE before they may find someone [to be] a [SDP];" and (2) SDP's argument that the

---

5 In *Souza,* the trial judge instructed the jury that:

> You heard of testimony from Dr. Tomich, a representative of the community access board. The law permits a representative of the community access board to testify in all proceedings like this one, and you may certainly rely upon the testimony of Dr. Tomich. However, you cannot find that the petitioner, Mr. Souza, is sexually dangerous based solely on the testimony of Dr. Tomich. In order for you to find that Mr. Souza is today a sexually dangerous person, you must find support for that determination in the opinion that [sic] Dr. Kelso, who testified as a qualified examiner.

Souza at *7.

QE testimony must, by itself, suffice to prove beyond a reasonable doubt that the person is sexually dangerous "is in at least some tension with those aspects of *Johnstone* and the statute that appear to envision a place for additional evidence of sexual dangerousness at trial").

In light of this incorrect instruction, a new trial is warranted.

II. THIS COURT SHOULD STAY THE DISCHARGE ORDER WHERE THE COMMONWEALTH HAS RAISED BOTH A MERITORIOUS ISSUE ON APPEAL AND COMPELLING CONCERNS FOR PUBLIC SAFETY.

Precedent exists for allowance of the Commonwealth's motion for stay. In other cases where the Commonwealth raised issues worthy of appellate consideration and the Commonwealth stated public safety concerns and the risk of loss of jurisdiction if a stay were denied, a single justice of the Appeals Court stayed the petitioner's release pending appeal. *See Wyatt, petitioner*, 428 Mass. 347, 349 (1998); *Hill, petitioner*, 422 Mass. 147, 151, *cert. denied*, 519 U.S. 867 (1996).

As this case involves the potential release from the Treatment Center, a DOC facility, it is useful to consider the decision to stay the Court's order in a criminal context. In the context of a stay of execution of a criminal sentence, the court must examine two categories of consideration. First, the court must consider whether the appeal presents an "'issue which is worthy of presentation to an appellate court, one which offers some reasonable possibility of a successful decision in the appeal.'" *Commonwealth v. Hodge*, 380 Mass. 851, 855 (1980), *quoting Commonwealth v. Allen*, 378 Mass. 489, 498 (1979) (citation omitted); *see Commonwealth v. Levin*, 7 Mass. App. Ct. 501, 504 (1979) ("the standard of 'reasonable success on appeal' is not one of substantial certainty of success, but rather is one equivalent to the civil concept of 'meritorious appeal;' that is, an appeal which presents an issue which is worthy of presentation to an appellate court, one which offers some reasonable possibility of a successful decision in its

appeal"). Second, the court must also consider security factors such as the likelihood of flight, the potential danger to any person or the community and the likelihood of further criminal acts during the pendency of the appeal. *Hodge*, 380 Mass. at 855; *Levin*, 7 Mass. App. Ct. at 505. Applying the *Levin/Hodge/Allen* analysis to the present case, it is clear that the Commonwealth satisfies both factors. The Commonwealth raises an issue that merits appellate consideration and articulates compelling concerns for public safety to warrant a stay pending appeal.

A. THE COMMONWEALTH PRESENTS A MERITORIOUS ISSUE ON APPEAL.

First, in light of *Souza*, there can be no reasonable dispute that the Commonwealth raises a meritorious issue on appeal.

B. PUBLIC SAFETY COMPELS THE STAY OF THE DISCHARGE ORDER.

Turning to the second consideration under the *Levin/Hodge/Allen* analysis, the Court must evaluate whether the petitioner poses a risk of flight or is likely to commit additional crimes during the pendency of the appeal. *Hodge*, 380 Mass. at 855; *Levin*, 7 Mass. App. Ct. at 505. Relevant considerations include familial status, roots in the community, prior criminal record and general attitude and demeanor. *Hodge*, 380 Mass. at 855; *Levin*, 7 Mass. App. Ct. at 505. Because the factors that led Green to sexually assault three women remain in tact, he poses a substantial danger to the community. See, generally, Trial Exhibits 4, 7.

Green's confinement for four years as an SDP coupled with the prospect of continuing his day-to-life civil commitment pose powerful incentives for the petitioner to flee the Commonwealth while awaiting resolution of the Commonwealth's appeal. The strength of the Commonwealth's appeal in light of *Souza* increases the risk of flight.

If the Commonwealth prevails on appeal and Green has already been discharged from the Treatment Center, it will likely be impossible to ensure his return to civil commitment. Green

has fully served his criminal sentence. Thus, if the order of discharge is not stayed, he will be returned immediately and directly to the community. Since he does not have any probation, there is no guarantee that Green will remain in the Commonwealth.

In addition, important considerations of public safety compel the stay pending resolution of the Commonwealth's appeal. Green, who is 56 years old, presents a significant danger to public safety. Green has been convicted of sexually attacking women on three separate occasions for which he has served three separate state prison terms. After a 1991 conviction for indecent assault and battery on a person over fourteen years, Green was sentenced to five years in state prison. In 1998, he was convicted of rape and assault with intent to rape, for which he was sentenced to five years in prison. Only twenty days after release from his second state prison sentence, Green raped another woman. Following his convictions for rape and assault and battery, Green was sentenced to eight years in state prison. See, e.g., Trial Exhibits 4, 7. Based on his present mental condition, Green remains a substantial threat to reoffend if released. See, generally, Trial Exhibits 4, 7.

While the Commonwealth recognizes the considerable interest involved in continued confinement, overriding interests of public safety and the petitioner's risk of flight, combined with the meritorious issue presented by the Commonwealth on appeal, compel the Commonwealth to seek a stay of the discharge order until its appeal is resolved. To do otherwise would deprive the Commonwealth of any means of insuring that it could regain Green's custody should it succeed on appeal. The Court should not deprive the Commonwealth of the practical ability to seek compliance with a favorable appellate decision.

III. THE COURT SHOULD EXTEND THE STAY TO PERMIT THE COMMONWEALTH TO SEEK A STAY FROM THE APPELLATE COURTS.

In the event that the Court denies the motion to reconsider and the motion for a stay pending appeal, the Commonwealth respectfully requests that the Court extend the stay of discharge until March 30, 2015 to permit the Commonwealth to seek a stay from the appellate courts.

CONCLUSION

For the foregoing reasons, the Commonwealth respectfully requests that this Court set aside the verdict and order that a jury trial commence in a timely fashion. In the alternative, the Commonwealth requests that the Court enter a stay of discharge order pending resolution of the Commonwealth's appeal. Lastly, the Commonwealth requests a stay of the discharge order until March 30, 2015 to permit the Commonwealth to seek a stay from the appellate courts.

Respectfully Submitted
by the Commonwealth

NANCY ANKERS WHITE
Special Assistant Attorney General

by: _____

Sabine M. Coyne, Counsel
BBO #632968
Department of Correction
Massachusetts Treatment Center
30 Administration Road
Bridgewater, Massachusetts 02324
(508) 279-8147

Dated: March 20, 2015

CERTIFICATE OF SERVICE

I hereby certify that I served a copy of this document upon the petitioner's counsel, Sondra Schmidt, via email.

_____
Mary P. Murray

Dated: March 20, 2015

Westlaw

--- N.E.3d ---, 2015 WL 1214608 (Mass.App.Ct.)
(Cite as: 2015 WL 1214608 (Mass.App.Ct.))

Only the Westlaw citation is currently available.

Appeals Court of Massachusetts, Suffolk.

George SOUZA, petitioner.

No. 13–P–1052.
June 3, 2014.
March 18, 2015.

Sex Offender. Practice, Civil, Sex offender, Directed verdict, Instructions to jury. *Evidence,* Sex offender, Expert opinion.
Petition filed in the Superior Court Department on February 2, 2009.
The case was tried before *Diane M. Kottmyer,* J.
Mary P. Murray for the Commonwealth.

Michael A. Nam–Krane for the petitioner.

Present: KANTROWITZ, MILKEY, & HANLON, JJ.

HANLON, J.

***1 George Souza** filed a petition in Superior Court seeking release from his civil confinement as a "sexually dangerous person" (SDP). See G.L. c. 123A, § 9. At trial, the jury was unable to reach a verdict and, thereafter, the trial judge allowed Souza's motion for a directed verdict of not guilty. The Commonwealth appeals, arguing there was sufficient evidence to permit a retrial. We agree and reverse.

Background. We recite the evidence heard by the jury in the light most favorable to the Commonwealth. *Commonwealth v. Cowen,* 452 Mass. 757, 763 (2008). Souza has a significant adult criminal record, extending over a period from 1963 until his last conviction in 2000.[FN1] In 1971, he pled guilty in New York to "rape in the second degree" for having "engaged in sexual intercourse with ... [a] female less than ... fourteen years of age." [FN2] Souza has maintained that the victim was working as a "prostitute" at the time, that she looked eighteen to him, and that she agreed to engage in sex with him. Nevertheless, in one interview, he also stated, "[A] little girl came ... it was my fault ... this little child ... I should never [have] went with this child." When asked how old the girl had been, he said, "I have no idea ... I don't even want to guess." He was then twenty-seven years old. On another occasion, in 2011, Souza asserted that the police entered the room where he was with the victim "before any sexual activity took place." More recently, in a group therapy session in 2012, Souza, discussing the New York offense, told the group that he had "engag[ed] in sexual intercourse with a 15–year–old prostitute ... [and] that she did not look 15 because they make them bigger in New York."

FN1. There was evidence that Souza first came to the attention of the police when he was eleven years old. At the trial, his record showed Massachusetts convictions for indecent assault and battery on a child under fourteen, robbery, larceny from the person, breaking and entering with intent to commit a felony, and larceny from a building. There were convictions in New York for criminal possession of a forged instrument, endangering the welfare of a child, and rape in the second degree. The "counterfeiting and the endangering of a child's welfare ... charge[s] [were apparently] a result of having three young adolescent boys essentially run the counterfeit money into various establishments and get change for objects that Mr. Souza then kept or split with the boys."

The record also indicates that Souza has "committed crimes in a number of [other] states including ... Rhode Island, Oklahoma, Nevada, and California."

EXHIBIT 1

FN2. The same indictment also charged Souza with, on or about May 25, 1971, until on or about June 7, 1971, two counts of "promoting prostitution in the first degree" by "knowingly advanc[ing] and profit[ing] from prostitution of a person less than sixteen years old, to wit, [a victim], aged thirteen." A third count charged Souza with "promoting prostitution in the second degree," committed as follows: Said defendant ... advanced and profited from prostitution by managing, supervising, controlling and owning, a house of prostitution and a prostitution business and enterprise involving prostitution activity by two prostitutes." Those charges apparently were dropped, and, because the names of the victim or victims were redacted from the copy of the indictment introduced at trial, it is not completely clear whether the victim of the rape charge was also the subject of the prostitution charges. However, in a 2003 evaluation by John Daignault, Psy.D., Souza stated that, after he paid the victim in the 1971 rape case, the victim "asked to stay with him and he let her, and he ended up getting arrested several days later because he was letting her 'trick' out of his house and the police investigated."

Souza's conviction in 2000 for indecent assault and battery on a child under the age of fourteen arises out of an incident in 1990 with a nine year old boy in Fall River. After he was arrested, Souza defaulted and left the State. Arrested on another charge in New York, Souza was returned to Massachusetts and pleaded guilty in 2000. The Commonwealth alleged that Souza had offered the victim a ride on a motorcycle, and then accosted him, pulling down his pants and the victim's pants and then putting his penis in the victim's mouth and ejaculating. Souza told the victim not to tell his mother or he would "hurt him bad." At the plea hearing, Souza admitted only to rubbing the victim's penis and thereafter denied any involvement in the incident, accusing the victim's mother of fabricating the story and his lawyer of forcing him to plead guilty.

For that incident, Souza received a sentence of three years to three years and one day. Before his release, the Commonwealth filed a petition alleging that Souza was sexually dangerous under the provisions of G.L. c. 123A, §§ 1, 12 – 16. After a jury-waived trial, the judge found Souza to be an SDP and committed him to the Massachusetts Treatment Center (Treatment Center) for an indefinite term. See G.L. c. 123A, § 14. Souza appealed, challenging both the sufficiency of the evidence that he was an SDP and the use of statements he made to the Commonwealth's expert. This court affirmed in a memorandum and order pursuant to our rule 1:28. See *Commonwealth v. Souza*, 70 Mass.App.Ct. 1105 (2007).

***2** Souza's record while incarcerated reveals a number of incidents. He was the victim of an assault by other inmates at least once. In addition, he was disciplined for some relatively minor infractions, along with physical altercations on a number of occasions. At the Treatment Center, he received twenty-three "Observation of Behavior Reports" (OBRs) during the decade he was confined there. Those records included some substantiated incidents of violence: in 2004, Souza got into a physical altercation with his roommate, and in February of 2012, he spat at and pushed another resident and then banged his own head on a cell door to make it look as though a guard had attacked him.

It is undisputed that Souza did not complete sex offender treatment while he was at the Treatment Center. In fact, although he had begun the initial phase of treatment during his incarceration for the incident with the nine year old boy, Souza did not enroll in any treatment during his first six years at the Treatment Center. Despite his regular attendance in treatment classes thereafter, Souza made only limited progress. At the time of trial, when Souza was sixty-nine, he remained in the early stages of the treatment programs offered to him.

--- N.E.3d ----, 2015 WL 1214608 (Mass.App.Ct.)
(Cite as: 2015 WL 1214608 (Mass.App.Ct.))

FN3

FN3. In 2012, the Treatment Center subjected Souza to a "penile plethysmograph" (PPG) test designed to measure the extent to which he was aroused by various appropriate and inappropriate stimuli. According to the test evaluator, Souza did not demonstrate any significant arousal to any stimuli, and, based on those results, behavioral conditioning was not recommended at that time.

In March of 2012, a divided Community Access Board (CAB) concluded in a four-to-one vote, that Souza no longer met the criteria of an SDP. The two qualified examiners (QEs) who examined him also were divided on the question.

The Commonwealth's case at trial. At trial, the Commonwealth relied primarily on the testimony of two experts.[FN4] Frederick W. Kelso, Ph.D., one of the QEs, testified that Souza suffered from "pedophilia" and " antisocial personality disorder " (APD), as those terms are defined in the American Psychiatric Association's Diagnostic and Statistical Manual of Mental Disorders (rev. 4th ed. 2000) (DSM–IV). Kelso opined that those mental conditions interfered with Souza's ability to control his sexual urges, and that he was likely to reoffend if not confined. He identified Souza's "risk factors" as having committed a prior sex offense, including a sex offense against a stranger, sex offenses against children not related to him, and a sex offense against a male. Kelso also noted Souza's "past experience of deviant sexual preferences, and his failure to complete sex offender treatment at the Treatment Center." At the time of the Fall River incident, Souza was "then forty-six years old, and the victim of the sex offense was a boy who was then nine years and one month old."

FN4. Two other Commonwealth witnesses testified briefly. The deputy superintendent of classification and treatment at the Treatment Center testified that Souza exercised regularly, running laps in the exercise yard, and that Souza has spoken to him about how important it is for him to stay in good physical shape. The assistant treatment coordinator at the Treatment Center testified that Souza had been suspended from participation in group therapy for a "physical altercation that took place" between Souza and another resident and that there had been unexcused absences from the group as well.

Niklos Tomich, Psy.D., chair of CAB, filed a minority report from the CAB, concluding that Souza was still sexually dangerous. He essentially agreed with Kelso. Tomich described Souza as an "outlier.... [I]t means somebody who differentiates from the norm." [FN5] According to Tomich, Souza "essentially showed an enduring and rather chronic course of antisocial behavior. That has been unremitting. He has shown very little remorse. He essentially continues to obfuscate responsibility for the crimes for which he was convicted, especially the sex offenses, which is what [Tomich was] mostly concerned about."

FN5. Tomich explained that Souza "has two convictions of sexual offenses, but he also has a very long criminal history that includes seventeen additional convictions ... including other types of offenses.... Subsequent to his most recent period of incarceration and then civil commitment, he also has approximately twenty-five disciplinary reports, some of them of a violent nature."

*3 Significantly, Tomich also opined that Souza "meets the criteria for pedophilia." [FN6] He pointed out that "both his victims were children [and that] ... [w]hat stood out ... for those offenses was the fact that they occurred over a very long period of time. And, in addition, he has both a male victim and a female victim. So, this tends to increase his victim pool." In addition, Tomich found significant the fact that the girl victim was a

stranger, thus increasing the pool of potential victims, and that, when Souza committed the offense against the boy victim, he knew about the possible repercussions in the criminal justice system, having previously served a four year sentence in New York.

> FN6. In her memorandum of decision, the judge stated that, while Tomich found that Souza exhibited signs of pedophilia, "he did not diagnose Mr. Souza with" that disorder. Although the import of the distinction the judge drew is not entirely clear, Tomich made it plain that he did in fact diagnose Sousa with pedophilia. In response to the prosecutor's question, "Did you diagnose Mr. Souza with anything else?" Tomich replied, "Yes." To the question, "And what was that?" Tomich replied, "He also meets the criteria for pedophilia."

Tomich contrasted those "static factors," factors that do not change over time, with "what are called dynamic factors or factors that ... may change over time, that may get stronger or weaker, depending on the situation [Souza's] in." In this case, those factors also supported Tomich's conclusion that Souza was an SDP, particularly his "unwillingness to abide by the mores and folkways and rules of society. He just doesn't want to do that and he hasn't." Tomich also considered Souza's unwillingness to take responsibility for either offense.

Tomich did consider protective factors, including Souza's age of sixty-nine, an age at which sex offenders often are considered less dangerous. Tomich noted that Souza's second sex offense took place when he was forty-six and that his last criminal arrest took place when he was fifty-five; in addition, Souza's behavior in the Treatment Center included offenses that could have been charged as criminal had he not been held. Finally, while Souza was engaged in treatment, he was only at a preliminary stage of that treatment, a level that Tomich found "inadequate." In support, he pointed to a treatment note from a group therapy session less than two months before the trial. In that group, Souza had given three different accounts of the New York offense and the surrounding circumstances within the time of one session. Tomich stated that he wasn't suggesting that Souza was lying. Instead, he stressed that Souza "is disordered and requires treatment.... [A] function of his disorder is that he distorts his history and distorts events in the record. That complicates and confounds treatment."

Souza's case. Souza countered with testimony from four experts: Michael G. Henry, Psy.D. (the other QE), Michael J. Murphy, Ed.D. (the CAB member who authored the CAB majority report), and two privately-retained psychologists. Focusing especially on Souza's advanced age, the PPG results, and the limited evidence that he suffered from any sexual compulsions at the time of trial, those experts opined that Souza was not currently sexually dangerous and did not present a likelihood of reoffending.

The directed verdict. Souza moved for a directed verdict after the Commonwealth rested its case and again at the end of the trial. The judge reserved ruling on the motion and sent the case to the jury. [FN7] The jury reported that they had reached "an impass[e]," and they "remain[ed] deadlocked" even after receiving a *Tuey–Rodriquez* charge.[FN8] See *Commonwealth v. Rodriquez,* 364 Mass. 87, 101–102 (1973). The judge discharged them and allowed both sides to submit briefing on Souza's motion for a directed verdict. In a memorandum of decision issued on April 11, 2013, the judge allowed Souza's motion. Judgment entered, and this appeal ensued.[FN9]

> FN7. The case had been tried earlier to a different jury, but a mistrial was declared after Souza became ill.
>
> FN8. In a jury trial held on a G.L. c. 123A, § 9, release petition, the jury may act through a five-sixths majority, as is gener-

ally true in civil cases. *Sheridan, petitioner,* 422 Mass. 776, 780–781 (1996). See generally G.L. c. 234, § 34A.

FN9. Judgment entered in **Souza's** favor on April 17, 2013, but the judge temporarily stayed **Souza's** release to allow the Commonwealth time to determine whether to appeal. The Commonwealth filed its notice of appeal on April 29, 2013. It then requested that **Souza's** release further be stayed, and **Souza** cross-moved, requesting that he be released pending appeal subject to various specified conditions, including global positioning system (GPS) monitoring. The trial judge allowed **Souza's** motion, and a single justice of this court denied the Commonwealth's motion for a stay pending appeal. The Commonwealth then pursued a stay through filing a petition pursuant to G.L. c. 211, § 3. A single justice of the Supreme Judicial Court denied that petition on June 26, 2013. Souza eventually was released pursuant to an amended "order of discharge" entered on June 28, 2013, that included GPS monitoring and nine other conditions. He has completed all of his sentences and has no probation or parole conditions remaining on any underlying offense.

***4** In her memorandum of decision, the judge ruled that "[a] properly instructed rational juror could not find that the Commonwealth had proved beyond a reasonable doubt that petitioner suffers from Pedophilia as defined in the DSM IV." In a footnote, she stated, "[a]ll of the experts, including Dr. Kelso, testified that the criteria for Pedophilia in the DSM–IV include 'over a period at least 6 months, recurrent, intense, sexually arousing fantasies, sexual urges or behaviors involving sexual activity with a prepubescent child or children (generally 13 years of age or younger).' " While the judge acknowledged that the nine year old male victim in the 1990 incident clearly was prepubescent, she found the evidence insufficient to support a conclusion that the thirteen year old female victim in the 1971 incident was prepubescent. In so doing, the judge relied on the testimony of a defense expert, saying that "[t]he Tanner scale, which is used by pediatricians to stage physical sexual development of children, places a 13 year old at 85–90% post-pubescent." From this, the judge concluded that it was "very unlikely" that the thirteen year old was prepubescent and therefore the conclusion of both Commonwealth experts, based as it was on "an insufficient evidentiary foundation," was not sufficient to meet the Commonwealth's burden of proof.

While the judge acknowledged that the "evidence was sufficient to support a finding beyond a reasonable doubt that petitioner today suffers from an Antisocial Personality Disorder," in her view, that diagnosis alone was not sufficient because, as she said (rightly), "to establish sexual dangerousness, the Commonwealth must prove beyond a reasonable doubt that the mental condition causes serious difficulty in controlling sexual impulses *today*." She concluded:

> "[T]he petitioner is 69 years old today. His most recent sexual offense or sexual misconduct of any kind was in 1990. He was a fugitive for eight years and has been incarcerated since 1999. There is no evidence of any sexual interest in children or sexual acting out of any kind during the years petitioner lived in the community on bail and as a fugitive (1991–1999) or during the thirteen years since his incarceration on the 1990 offense and subsequent civil commitment (1999 to the present)."

Given the fact that the "only evidence of sexual interest in children on the part of petitioner are the crimes committed in ... 1971 and 1990," the judge dismissed as inappropriate considerations of Souza's failure to engage in treatment, score on the "Static 99" and "antisocial tendencies."

Discussion. Sufficiency. The issue is "whether,

after viewing the evidence (and all permissible inferences) in the light most favorable to the Commonwealth, any rational trier of fact could have found, beyond a reasonable doubt, the essential elements of sexual dangerousness as defined by G.L. c. 123A, § 1." *Commonwealth v. Blake,* 454 Mass. 267, 271 (2009) (Ireland, J., concurring), quoting from *Commonwealth v. Boyer,* 61 Mass.App.Ct. 582, 589 (2004). Applying that standard, we are satisfied that the Commonwealth's evidence here was sufficient to reach the jury.

*5 As relevant to this case, a " '[s]exually dangerous person', [is] any person who has been ... (iii) previously adjudicated as such by a court of the commonwealth and whose misconduct in sexual matters indicates a general lack of power to control his sexual impulses, as evidenced by repetitive or compulsive sexual misconduct by either violence against any victim, or aggression against any victim under the age of 16 years, and who, as a result, is likely to attack or otherwise inflict injury on such victims because of his uncontrolled or uncontrollable desires." G.L. c. 123A, § 1, as appearing in St.1999, c. 74, § 6. As the Commonwealth argues, the first two elements of the statute are not at issue.

In support of the third element, the Commonwealth offered two expert witnesses, each of whom testified that, in his opinion, Souza was an SDP. There was no challenge to the expertise of either witness, and the testimony itself was admitted without objection. Each of the Commonwealth expert witnesses testified that Souza suffered from antisocial personality disorder and pedophilia. "[E]ither diagnosis is adequate to satisfy the definitional requirements of a sexually dangerous person in G.L. c. 123A, § 1." *Commonwealth v. Reese,* 438 Mass. 519, 526 n. 9 (2003). Kelso testified that, in his opinion, Souza's behavior in committing the two separate sexual offenses was repetitive and compulsive,[FN10] and "at the present time, Mr. Souza is not adequately able to control his sexual impulses and would not be able to adequately control his sexual impulses if he were to now be released from the Treatment Center." Tomich also testified that Souza's offenses were repetitive and compulsive and that he was unable to "effectively intervene in or control his sexual impulses." Each expert opined that, "if released, Mr. Souza would be likely to re-offend sexually if not confined to a secure facility."

> FN10. Dr. Kelso noted that, notwithstanding the fact that Souza was put on notice by the State of New York in 1971 that his behavior in committing the sexual offense against the young girl was "inappropriate and criminal and that engaging in that kind of conduct would result in a serious negative consequence, incarceration," Souza went on to commit a second sexual offense in Massachusetts, which "speaks to the sense that he's compelled to engage in the behavior even after he experiences a negative consequence."

The judge's conclusion to the contrary rests significantly upon her acceptance of the defense witness's testimony about the "Tanner scale['s]" definition of prepubescence and the consequences of that definition for the DSM–IV's definition of pedophilia. That was an issue of credibility that should have been left to the jury. "The matter of how much weight is to be given a witness, particularly an expert witness, is a matter for the trier of fact.... See *Hill, petitioner,* 422 Mass. 147, 156 (1996). This is particularly true of experts in the medical field, who regularly are permitted to testify on the basis of examination of records and other materials with respect to an issue in dispute." *Commonwealth v. Cowen,* 452 Mass. at 762.

As the courts have noted repeatedly, "the sexually dangerous persons statute makes no reference to [the DSM–IV], nor does it set forth any requirement that the statutory definition of mental abnormality be limited to the abnormalities outlined in the DSM–IV. Cf. *Doe, Sex Offender Registry Bd. No. 1211 v. Sex Offender Registry Bd.,* 447 Mass. 750, 765 n. 13 (2006) ('[p]edophilia is a psychiatric

disorder, not a legal classification')." *Commonwealth v. Starkus,* 69 Mass.App.Ct. 326, 336 (2007) . See *Commonwealth v. Husband,* 82 Mass.App.Ct. 1, 5 (2012) ("[T]he legal definition of personality disorder applicable to SDP proceedings is not required to match the clinical definition of personality disorder found in the American Psychiatric Association's Diagnostic and Statistical Manual of Mental Disorders (4th ed. 2000) (DSM–IV).... The technical distinctions among various clinical diagnoses are immaterial so long as the Commonwealth proves beyond a reasonable doubt that the defendant suffers from a 'personality disorder which makes [him] likely to engage in sexual offenses if not confined to a secure facility.' G.L. c. 123A, § 1").

***6** Equally important, the DSM–IV definition of pedophilia *on its face* describes prepubescent as "generally age 13 or younger." *Commonwealth v. Starkus, supra* at 336. It is only the gloss added by the defense expert's definition of prepubescence that permitted the judge to opine that it was "very unlikely" that this thirteen year old female victim was "prepubescent" in 1971, despite Souza's description of her (at least once) as having been a "little child" when he raped her. In fact, regardless of the precise state of the child's anatomical development, this victim was far below the age of consent and Souza's actions with her, at age twenty-seven, reasonably could be seen by a factfinder as manifesting a form of "mental abnormality" within the meaning of the statute.

Nor can the petitioner's age or the length of time since his last conviction for a sex offense be considered dispositive here. Each of the Commonwealth's experts considered those factors as protective and reasonably concluded that, considering all of the factors, they did not change the assessment. For example, Kelso relied in part on the so-called "Static 99R" model, a predictive tool that takes into account a subject's age. Applying that model to the particulars of Souza's offenses and history, Kelso scored him as a five or a six, the latter score falling into the range of what is considered a high risk of reoffending.[FN11] Thus, the jury had before it empirically-based evidence that Souza presented a high risk to reoffend notwithstanding his age.

> FN11. In Kelso's testimony and his report, he referred to "Static–99." Asked by the prosecutor to explain what that was, Kelso responded that it was "a very widely used sex offender risk assessment instrument." A different version, "the Static–99R adjusts the age item so that if you're an older sex offender, your advanced age is taken into account in terms of your total score." Kelso testified that Souza's score was slightly lower on the Static–99R than on the Static–99, but that he remained a high risk to offend, even with the lower score. Specifically, Kelso testified that "while [he thought Souza's] current age [was] one factor that merits consideration in the risk assessment, [he didn't] think it so overwhelm[ed] his status on the other risk factors as to be the only risk factor worthy of consideration." In particular, Kelso noted that Souza was forty-six when he committed the 1990 sex offense with the boy victim.

The law is clear that the lapse of time, by itself, is not dispositive, particularly when the petitioner has been held for a significant period of time in a secure environment with no opportunity to interact with young children. See *Commonwealth v. Blanchette,* 54 Mass.App.Ct. 165, 178 (2002) ("[T]he judge appears to have reduced the grounds for the expert's opinion only to [the petitioner's] prior sex crimes, ignoring in the process other factors which he considered when forming his opinion, such as [the petitioner's] personal history and [his] decision, while incarcerated, to decline sexual offender treatment. As to the latter, the Supreme Judicial Court cogently observed in ... *Hill,* [*petitioner,*] 422 Mass .... [at] 157, ... that

'*[e]xamples of recent conduct showing sexual*

dangerousness may often be lacking where the individual's dangerous disposition is of a sort that there will be no occasion for that disposition to manifest itself in a secure environment. And it cannot be the case that an individual's refusal to submit to examination or to participate in treatment, in which his current dispositions might manifest themselves, will more or less automatically guarantee himself a favorable determination' ").

The court's language in *Commonwealth v. Reese,* 538 Mass. at 526 is instructive here. "It is ... apparent from the record that the ruling is an expression of the judge's personal conclusion regarding the expert[s'] credibility, based on [her] own opinion of the proper application of the DSM–IV, and the significance of the differences between [the experts'] testimony and the DSM–IV text. This was error. The testimony of the expert[s] is not 'so incredible, insubstantial, or otherwise of such a quality that no reasonable person could rely on it.' *Commonwealth v. Blanchette, supra* at 175."

*7 *Jury instructions.* The Commonwealth also argues that the judge erred in instructing the jury with regard to the extent it was to rely on the testimony of Kelso (who testified as a QE), as opposed to the testimony of Tomich (who did not). Specifically, based on her reading of *Johnstone, petitioner,* 453 Mass. 544, 553 (2009), the judge instructed the jury that:

"You heard of testimony from Dr. Tomich, a representative of the community access board. The law permits a representative of the community access board to testify in all proceedings like this one, and you may certainly rely upon the testimony of Dr. Tomich. However, you cannot find that the petitioner, Mr. Souza, is sexually dangerous based solely on the testimony of Dr. Tomich. In order for you to find that Mr. Souza is today a sexually dangerous person, you must find support for that determination in the opinion that [sic] Dr. Kelso, who testified as a qualified examiner."

Because the propriety of this instruction is likely to arise again in a retrial, we address it now.

We agree with the Commonwealth that such an instruction is not compelled by *Johnstone,* and that it is otherwise inadvisable. *Johnstone* held only that the Commonwealth cannot continue to pursue SDP confinement of someone unless at least one of the two assigned QEs concludes that the person is an SDP. *Id.* at 553. That precondition was satisfied here. As the judge herself recognized, in determining whether someone is an SDP, jurors are not precluded from relying on evidence from non-QE sources. The judge's efforts to acknowledge this to the jury, while still trying to create a special evidentiary role for the QE, led to an instruction that was confusing at best and not a fair statement of the law. Where, as here, the gatekeeping role served by QEs has been satisfied, and the Commonwealth offers additional expert testimony, a trial judge should refrain from suggesting the relative weight the jury can or should assign to the various Commonwealth experts.[FN12]

FN12. The Commonwealth also seeks review of Souza's release on conditions pending appeal. However, it did not file a notice of appeal regarding any of the orders that allowed his release pending appeal, and therefore cannot seek review of such orders now. As Souza points out, the propriety of his release pending appeal is also now moot.

Conclusion. We vacate the judgment and remand this matter to Superior Court for further proceedings consistent with this opinion.

So ordered.

MILKEY, J. (dissenting).

The majority's well-reasoned opinion has a surficial logic that is difficult to contest. In addition, I agree that it is important that judges usurp neither the fact-finding role assigned to juries, nor the gatekeeping role assigned to "qualified examiners"

(QEs) pursuant to G.L. c. 123A. Nevertheless, for the reasons set forth below, I ultimately agree with the trial judge that the Commonwealth's evidence that George Souza is currently a "sexually dangerous person" (SDP), as defined by G.L. c. 123A, § 1, was so insubstantial that, as a matter of law, it cannot justify his continued detention. I therefore respectfully dissent.

In examining the sufficiency of the Commonwealth's proof, it is important to consider the extraordinary context in which this dispute arises. It is uncontroverted that Souza has both committed odious crimes and fully served his punishment for those crimes; indeed, he already has been deprived of his liberty for almost a decade after his prison term ended. The Commonwealth seeks to have him reconfined not in punishment for his past crimes but in anticipation that he may commit future ones. In this context, the ordinary rule barring propensity evidence does not apply. In fact, propensity is the main focus of SDP proceedings, and experts are called upon to speak directly to that issue (with seeming oracular certitude). Contrast *Commonwealth v. Sepheus*, 468 Mass. 160, 172 (2014) (defense counsel determined to have been constitutionally ineffective for failing to move to strike expert testimony that went directly to defendant's guilt).

***8** By definition, preventative detention schemes allow people to be locked up for crimes they indisputably have not committed, even in the face of the constitutional presumption of innocence. As the United States Supreme Court has held, the constitutionality of such schemes depends on the theory that the people so confined suffer from distinct mental conditions that prevent them from controlling their dangerous behaviors in the future. *Kansas v. Hendricks*, 521 U.S. 346, 358–360 (1997). It necessarily follows that, absent an adequate medical foundation, the constitutionality of continued confinement is called into question. See *id.* at 373 (Kennedy, J ., concurring) ("[I]f it were shown that mental abnormality is too imprecise a category to offer a solid basis for concluding that civil detention is justified, our precedents would not suffice to validate it").[FN1] This constitutional overlay needs to be kept in mind in assessing the adequacy of the nature and quantum of the Commonwealth's evidentiary proof. When such considerations are taken into account, the Commonwealth's proof here falls short of acceptable norms.

> FN1. See also *Matter of State of N.Y. v. Shannon S.*, 20 N.Y.3d 99, 109–110 (2012) (Smith, J., dissenting), quoting from *Kansas v. Crane*, 534 U.S. 407, 413 (2002) ("[U]nless 'mental abnormality' is defined with scientific rigor, [sexual dangerousness] statutes could become a license to lock up indefinitely, without invoking the cumbersome procedures of the criminal law, every sex offender a judge or jury thinks likely to offend again[; such statutes] must be limited to people who can be shown by scientifically valid criteria to have a 'serious mental illness, abnormality, or disorder'—one that distinguishes them 'from the dangerous but typical recidivist convicted in an ordinary criminal case' ").

Certainly, the majority is correct that existing cases state that judges in SDP cases must proceed with caution before directing a verdict against the Commonwealth (or issuing a like order finding the Commonwealth's case deficient as a matter of law). Thus, where there are competing expert opinions on whether someone is an SDP, a judge is not free to pick and choose which opinions to credit; that job falls to the jury. See *Commonwealth v. Reese*, 438 Mass. 519, 525–526 (2003). However, the cases do not stand for the proposition that once a QE has opined that someone is an SDP, a judge therefore must allow the case to go to the jury. To the contrary, they continue to recognize that a judge properly may terminate an SDP proceeding if the Commonwealth's evidence is "so incredible, insubstantial, or otherwise of such a quality that no reasonable person could rely on it to conclude that the

Commonwealth had met its burden of proof." *Id.* at 524, quoting from *Commonwealth v. Blanchette*, 54 Mass.App.Ct. 165, 175 (2002).[FN2] In my view, this is just such a case.

> FN2. The Commonwealth suggests that the QE's gatekeeping role effectively precludes a trial judge from scrutinizing the sufficiency of the evidence. In my view, the extraordinary context of preventative detention demands that judges continue to play such a role. Moreover, as this case well illustrates, in light of how the SDP scheme is structured, relying on juries to weed out unmeritorious SDP cases goes only so far. Although the Commonwealth was unable at trial to convince the requisite number of jurors to find that Souza remains an SDP, he now—over five years after his G.L. c. 123A, § 9, petition was filed—again faces the prospect of indefinite confinement. After retrial, he could be confined even in the absence of a jury finding that he currently is an SDP so long as a sufficient number of jurors held out for such a finding. This presents serious cause for concern, especially given that the underlying subject area is one that is "ruled by emotions." *Commonwealth v. Sullivan*, 82 Mass.App.Ct. 293, 319 (2012) (Milkey, J., dissenting).

Souza was sixty-nine years old at the time of trial. At that point, the statutory rape he committed was over four decades old, and the indecent assault and battery on a child (the only other sex offense at issue in this case) was over two decades old. As the Commonwealth's lead expert, Frederick W. Kelso, Ph.D., himself acknowledged, peer-reviewed empirical studies show that once sex offenders reach their sixties and seventies, they "tend not to be very likely to commit future sex offenses." Of course, that concession by itself does not present an insurmountable obstacle to the Commonwealth. Even if sex offenders generally are not very likely to reoffend at Souza's age, this does not preclude proof that Souza in particular suffers from mental conditions that render him likely to do so. However, such proof is lacking on the current record.

***9** The Commonwealth's experts relied in great part on their classifying Souza as a "pedophile" within the meaning of the American Psychiatric Association's Diagnostic and Statistical Manual of Mental Disorders (rev. 4th ed. 2000) (DSM–IV). According to them, it was the combination of pedophilia and " antisocial personality disorder " (APD) that created the undue risk that he would reoffend. In the words of the Commonwealth's second expert, psychologist Niklos Tomich, "Mr. Souza's Pedophilia results in his deviant arousal and behavior and his Antisocial Personality Disorder provides him the psychological means to engage behaviorally in, and then excuse, his behavior."

According to the DSM–IV, "a diagnosis of pedophilia requires '[a] period of at least six months, recurrent, intense sexually arousing fantasies, sexual urges, or behaviors involving sexual activity with a prepubescent child or children (generally age 13 or younger).' " *Commonwealth v. Starkus*, 69 Mass.App.Ct. 326, 336 (2007), quoting from the DSM–IV. As applied to the facts here, this required proof that the 1971 victim was prepubescent. The trial judge found the Commonwealth's proof of that point legally insufficient. The majority rejects the judge's reasoning on three grounds: (1) the Commonwealth is not bound by the definitions of the DSM–IV, (2) the state of the 1971 victim's anatomical development is irrelevant because she was in any event well below the age of consent, and (3) the Commonwealth put forward sufficient proof that the 1971 victim was prepubescent (thus in any event satisfying the definition of "pedophilia" set forth in the DSM–IV). I address these points in that order.

We have long recognized the DSM as the standard diagnostic authority in the psychiatric and psychological professions. See *Lambley v. Kameny*, 43 Mass.App.Ct. 277, 278 n. 4 (1997). Neverthe-

--- N.E.3d ----, 2015 WL 1214608 (Mass.App.Ct.)
(Cite as: 2015 WL 1214608 (Mass.App.Ct.))

less, as the majority correctly points out, in building a case that a sex offender suffers from a "mental abnormality" or "personality disorder," within the meaning of the SDP statute, the Commonwealth is not limited to those mental conditions enumerated and defined in the DSM. See *Commonwealth v. Husband,* 82 Mass.App.Ct. 1, 4–5 (2012), and cases cited. Of course, this does not prohibit Commonwealth experts from relying on the DSM; indeed, given the authoritative stature that the DSM enjoys in the medical community, it is hardly surprising that many experts would base their opinions on that source. Where, as here, the Commonwealth experts did just that, it is fair and appropriate to hold them to this, and the cases that the majority cites are not to the contrary.[FN3] When the Commonwealth's case is predicated upon a specific expert diagnosis of pedophilia as defined in the DSM, a lack of evidence of one of the definitional criteria may not be excused. Otherwise, the Commonwealth would be relieved of its burden of proving the underlying facts on which its expert's diagnosis was based. See *Narducci v. Contributory Ret. Appeal Bd.,* 68 Mass.App.Ct. 127, 135 (2007) (noting the distinction between an expert's ultimate conclusion and the "assumed" facts, which must be proved, on which the opinion is based).

> FN3. *Commonwealth v. Reese,* 438 Mass. at 520, was an appeal from a judge's finding of no probable cause after a hearing under G.L. c. 123A, § 12(*c*). The Supreme Judicial Court explained that at least in that context, the Commonwealth's expert could rely on clinical observations and experience independent of the DSM criteria to make a diagnosis of pedophilia. *Id.* at 525–526. *Reese* thus involved a situation in which the Commonwealth's expert explained that he was not resting his diagnosis on the DSM–IV. *Reese* does not say that where an expert relies on the DSM–IV at trial, the Commonwealth is excused from producing evidence that the DSM–IV criteria have been met.

***10** As the majority also accurately notes, the 1971 victim was well under the age of consent regardless of whether she was prepubescent. Therefore, the state of her anatomical development is irrelevant for purposes of determining whether a crime had been committed. However, whether Souza committed a crime and whether his actions show that he suffered from a particular "mental abnormality" are distinct questions. The DSM–IV does not classify an adult's attraction to anatomically developed but still underage adolescents as a "mental abnormality." [FN4] While the Commonwealth's experts could have sought to explain why they considered Souza as suffering from "pedophilia" apart from the definition in the DSM–IV, they did not do so.[FN5]

> FN4. That is hardly surprising given that, as Judge Smith of the New York Court of Appeals trenchantly has observed in writing for a three-judge dissent, "the idea that a man's mere *attraction* to pubescent females is abnormal is absurd." *Matter of State of N.Y. v. Shannon S.,* 20 N.Y.3d 99, 111 (2012) (Smith, J., dissenting).

> FN5. I recognize that lay jurors presumably would consider Souza a "pedophile" within the far broader everyday use of that term. But that underscores the constitutional concerns raised by allowing experts to untether their opinions from the stricter definitions accepted by the medical community as to what constitutes a "mental abnormality."

The question remains whether the Commonwealth in fact offered sufficient proof that the victim of the 1971 crime was prepubescent. Although the DSM–IV notes the unremarkable fact that prepubescent children are "generally age 13 or younger," it of course does not define prepubescence in those terms. It does not follow, except through false logic, that someone who is thirteen or younger therefore must be prepubescent. Even if the judge credited the defense experts' definition of prepubes-

cence (instead of leaving that question to the jury), her ruling does not depend on this. The overriding point is that the Commonwealth failed to offer the proof that its own experts' theory of Souza's alleged "mental abnormality" demanded. Finally, to the extent that the majority concludes that Souza's isolated references to the 1971 victim as "little" could constitute proof beyond a reasonable doubt that she was prepubescent, I disagree.

With the facts necessary to support the experts' diagnosis of pedophilia not having been put in evidence, the experts' opinion on that point cannot be used to avoid a directed verdict. See *LaFond v. Casey*, 43 Mass.App.Ct. 233, 237–238 (1997).[FN6] As we recently said, an expert opinion "premised on facts that [the expert] had gratuitously assumed and conjecture drawn from an insufficient evidentiary foundation ... [is] inherently flawed and legally incompetent." *Commonwealth v. Acosta*, 81 Mass.App.Ct. 836, 843 (2012).

> FN6. See also *Patterson v. Liberty Mut. Ins. Co.*, 48 Mass.App.Ct. 586, 592–593 (2000), and cases cited (an expert's opinion must be "based solely on the expert's 'direct personal knowledge' or admissible evidence in the record and not on assumptions that are not established by such evidence").

To be sure, the Commonwealth's failure to establish that Souza was properly classified as a pedophile does not mean that it cannot prove that he is an SDP. The majority is correct that the case law makes clear that proof that someone suffers from "antisocial personally disorder" (APD) by itself can be "adequate to satisfy the definitional requirements of" being an SDP. *Commonwealth v. Reese*, 438 Mass. at 526 n. 9. In other words, where the Commonwealth has proven APD, there is no threshold requirement that it prove a second medical condition. However, it does not follow that a diagnosis of APD, without more, constitutes sufficient proof. This is especially true where, as here, the experts testified that it was the very combination of pedophilia and APD that caused the undue risk of sexual dangerousness (thus making proof of both prongs critical).

*11 A close examination of the Commonwealth's use of APD evidence here reveals why it did not amount to sufficient proof. To demonstrate that Souza currently suffers from APD, the Commonwealth's experts relied principally on his obstreperous behavior while confined at the treatment center. Granted, Souza's comportment during his decade of confinement was hardly exemplary. However, his documented violations of Massachusetts Treatment Center (treatment center) rules averaged only about two per year, and they mainly involved minor infractions such as trying to get medication at an incorrect time, "[f]ailure to stand for a [head] count, sleeping during a count, [and] things of that nature." Notably, none of Souza's violations of treatment center rules involved any inappropriate sexual behavior. Compare *Commonwealth v. Husband*, 82 Mass.App.Ct. at 5 ("Commonwealth experts testified that [sex offender's] personality disorder resulted in his inability to control his sexual impulses as evidenced by both the governing offenses and his extensive record of sexually aggressive and abusive conduct while incarcerated").

Moreover, as the trial judge cogently observed, even though proof that someone has APD may be sufficient to satisfy the statute's definitional requirements, this does not relieve the Commonwealth from having to prove that Souza currently has sexual compulsions on which his APD will induce him to act. Absent such proof, Souza cannot constitutionally be preventively detained. Passing over the question of whether there was adequate proof that Souza ever suffered from sexual compulsions that likely would cause him to reoffend, [FN7] evidence that he continued to have such compulsions at age sixty-nine was conspicuously absent. In fact, the Commonwealth did not present any evidence that Souza exhibited sexually inappropriate behavior of any kind since 1990.[FN8] In addition, the only objective test administered to Souza by the

treatment center showed that he exhibited no clinically significant arousal to any of the sexual stimuli presented to him.[FN9]

FN7. This is not a case where the historical pattern of sex offenses itself demonstrated that the offender must have suffered from such compulsions.

FN8. Obviously, opportunities for sexual misbehavior may be more limited for someone who is confined, but they are hardly absent. Compare *Commonwealth v. Husband*, 82 Mass.App.Ct. at 2 (noting a sex offender's disciplinary record while incarcerated, in which "[h]is reported conduct toward prison female medical personnel included sexual epithets, insults, taunts, threats, exposure, and masturbation"). Moreover, as the evidence in this case revealed, sex offenders who target children sometimes exhibit sexually inappropriate behavior in confinement, such as hoarding pictures of children. There was even testimony about a pornography ring operating inside the treatment center; Souza was not implicated in any such activity.

FN9. Kelso discounted the results of the penile plethysmograph (PPG) test, even while acknowledging that respected empirical researchers had concluded that the best predictor of recidivism was sexual deviancy, as measured by PPG tests or other means. This is not to say that the reliability of PPGs has been established, and one of Souza's own experts stated that he does not put much stock in such tests. However, the fact remains that the one test that the treatment center itself administered to Souza to measure his response to sexual stimuli provided no evidence to support the Commonwealth's case and, if anything, undercut that case.

Nor do I believe the other factors the Commonwealth's experts relied upon supplied the missing proof. Both of the Commonwealth's experts emphasized Souza's refusal to admit his past sexual abuse of the two victims, something they asserted was a prerequisite to his being able to avoid reoffending. For example, in Tomich's view, Souza could not progress to the point that he safely could be released until he "squarely face[d] the reasons for his incarceration and for his civil commitment." Even to the extent Souza denied his offenses, [FN10] the import of that denial is, at a minimum, subject to significant doubt. The Commonwealth's lead expert acknowledged that a pre-eminent empirical study found no correlation between denial and recidivism. In the face of that study, the Commonwealth offered no empirical studies or evidence of a medical consensus to support its contrary position that denial is somehow a predictor of future offending.[FN11]

FN10. The uncontested facts belie any suggestion that Souza has accepted no responsibility for his two sex offenses. Indeed, Souza pleaded guilty to both offenses. In addition, even though his postplea accounts of the 1971 offense have varied somewhat, he has regularly admitted that he had intercourse with the 1971 victim while she was underage and that what he did was wrong. Granted, although Souza pleaded guilty to having indecently touched the 1990 victim, he denied sexually assaulting the boy in his postplea accounts. Souza was also indicted of rape of a child, something he consistently denied. The Commonwealth nol prossed the rape charge (after Souza's admitted that he touched the boy's penis), and it made no independent effort to substantiate that Souza had committed a rape. Nevertheless, the majority goes out of its way to highlight salacious details underlying the rape allegations even though the Commonwealth itself appropriately avoided the issue.

FN11. I fully appreciate that the Legislature has made the opinions of QEs admissible in SDP trials regardless of whether they have been demonstrated to be reliable, and that this situation-specific modification of the rules of evidence has been upheld. See *Commonwealth v. Markvart*, 437 Mass. 331, 339 (2002), citing G.L. c. 123A, § 14(c). However, especially in light of the overlaying constitutional concerns that are implicated, I do not interpret such precedent as barring any judicial inquiry into whether the opinion of the QE enjoys a demonstrated medical foundation. That inquiry need not embroil a trial judge in making credibility determinations or "weighing" the evidence.

***12** More generally, the Commonwealth's experts insisted that the risks Souza presented to the community at large should be considered unacceptable until he has completed a treatment program at the treatment center. That view presupposes both that Souza presents unacceptable risks without treatment and that treatment would address such risks. Neither proposition is self-evident, and one searches in vain for evidence to support them here. [FN12] In fact, the evidence that was presented tended to undercut the Commonwealth's case. For example, the treatment center itself ruled out one form of treatment—behavioral conditioning—given Souza's nonresponsiveness to sexual stimuli as measured by the PPG test.[FN13] The experts' reliance on Souza's failure to complete a treatment program is particularly problematic in light of the undisputed fact that Souza has profound cognitive limitations that, at a minimum, make it difficult for him to complete a classroom course of study. [FN14] Cf. *Kansas v. Hendricks*, 521 U.S. at 389–393 (Breyer, J., dissenting) (Sex offenders cannot be civilly confined without being offered adequate treatment). In addition, it is undisputed that Souza's efforts to pursue sex offender treatment were interrupted when his participation was suspended as a disciplinary sanction for his not complying with treatment center rules. In other words, for acting out while he was involuntarily confined based on his allegedly not having received adequate treatment, the Commonwealth withheld the treatment that it considered necessary to allow his release.

FN12. The experts' stance on the need for treatment is better understood as a policy position than as evidentiary proof. That the experts would adopt such a position is consistent with the institutional roles that each played. Kelso was an employee of the private contractor that provided sex offender services at the treatment center, and Tomich was the director of forensic psychological services at the Department of Correction.

FN13. Kelso, the Commonwealth's lead expert, acknowledged that a preeminent empirical study demonstrated only a minor correlation between treatment and recidivism. Again, the existence of that study did not preclude the Commonwealth from proving that Souza's failure to complete a treatment program mattered, but, again, the Commonwealth offered no empirical studies or evidence of medical consensus to substantiate its position.

FN14. It is undisputed that Souza is of borderline intelligence, with an IQ measured between sixty-eight and seventy-one. Treatment center records show that he is able to read at a third-grade level. Kelso acknowledged that Souza's cognitive limitations presented potential obstacles to his succeeding in the treatment classes made available to him, and Tomich acknowledged that Souza's cognitive limitations meant that "it may take him longer to benefit from treatment." There was evidence that programs tailored for people with Souza's limitations were "sometimes offered" at the treatment center, that at least one treatment component was modi-

fied to address those limitations, and that he was able to pass that one (and a "few" classes overall).

Finally, I address the Commonwealth's one attempt to take on Souza's advanced age with empirically-based proof. Kelso relied in part on the "Static–99R" model, a widely-used tool that attempts to predict the degree of likelihood that a convicted sex offender will reoffend. As Kelso explained, the Static–99R model was specifically formulated to address the reduction in risk correlated with the aging process. However, a close examination of Kelso's use of the Static–99R model shows that it provides negligible support for his position that Souza remains an SDP. Kelso accepted that Souza had been married, and he acknowledged that his long-term relationship with his wife may well have lasted more than two years. Kelso also acknowledged that if this were so, then by Kelso's own calculations, Souza would score only a five on the Static–99R test, which would place him outside the category of offenders considered to be at a high risk to reoffend.[FN15] None of this is to say that a sex offender may be found to be an SDP only if he scores in the high risk category using the Static–99R model. My point is merely that Kelso's own reliance on empirically-based modeling undercut his claim that Souza was currently at a high risk to reoffend.

FN15. Kelso was able to score Souza that high only by crediting him with six 1971 sex crimes, even though five of the six New York charges were dropped, and there was no independent evidence presented in this trial that Souza had committed those crimes.

In sum, in my view, the trial judge applied appropriate scrutiny to the expert opinions that the Commonwealth offered and—finding them lacking in adequate foundational support—properly terminated the proceeding and ordered Souza's release. In the face of the Commonwealth's efforts to portray its case as adorned in the raiments of medical expertise, the trial judge dared to point out that "the emperor has no clothes." [FN16]

FN16. Because I consider a retrial unwarranted, I would not reach the Commonwealth's claim that the jury instructions were erroneous. I state no view on the merits of that issue except to note that while I agree with the majority that a narrow reading of *Johnstone, Petitioner,* 453 Mass. 544, 553 (2009), does not compel the instruction that the trial judge gave, that instruction does find some support in the reasoning on which *Johnstone* is based. Clarification from the Supreme Judicial Court on this point of law would be beneficial.

Mass.App.Ct.,2015.
In re Souza
--- N.E.3d ---, 2015 WL 1214608 (Mass.App.Ct.)

END OF DOCUMENT

Westlaw.
989 N.E.2d 557
83 Mass.App.Ct. 1137, 989 N.E.2d 557, 2013 WL 3064445 (Mass.App.Ct.)
(Table, Text in WESTLAW), Unpublished Disposition
(Cite as: 83 Mass.App.Ct. 1137, 2013 WL 3064445 (Mass.App.Ct.))

NOTICE: THIS IS AN UNPUBLISHED OPINION.

Appeals Court of Massachusetts.
John YOUNG, petitioner.

No. 11–P–956.
June 20, 2013.

By the Court (VUONO, RUBIN & SULLIVAN, JJ.).

MEMORANDUM AND ORDER PURSUANT TO RULE 1:28

*1 This case comes to us in the same procedural posture as *McIntire, petitioner*, 458 Mass. 257 (2010), cert. denied, 131 S.Ct. 2909 (2011) (*McIntire*). During the pendency of this appeal, the petitioner has pursued relief in another petition under G.L. c. 123A, § 9. Following trial on that petition, he was found sexually dangerous, and that judgment is now separately on appeal. We decline, however, the Commonwealth's request to dismiss this appeal. *McIntire* did not dismiss the appeal there before the court, but rather held only that in these circumstances a petitioner successful in his appeal would not be "entitled to an order of discharge from the treatment center at this time." 458 Mass. at 266. The court in *McIntire* nonetheless addressed the merits of the appeal before it—indeed, after finding the petitioner's appeal had merit, it reversed the order below—and we follow the same procedure here.

We turn then to the merits. The petitioner in this case involving a petition for discharge from the Massachusetts Treatment Center pursuant to G.L. c. 123A, § 9, argues first that the Commonwealth was relieved of its burden to prove its case beyond a reasonable doubt by two of the judge's instructions. This claim was waived as there was no objection; "accordingly, we review for a substantial risk of a miscarriage of justice." *Commonwealth v. Walker*, 83 Mass.App.Ct. 901, 903 (2013). We first address the petitioner's argument that the judge's general instruction on proof beyond a reasonable doubt acted to lessen the burden of proof. In that instruction, the judge said, "proof beyond a reasonable doubt, that's a term that we all use, probably pretty well understood but it's not easily defined. It doesn't mean proof beyond all doubt. It doesn't mean proof beyond some fanciful or imaginary doubt. It doesn't mean beyond some possible doubt. Doesn't mean proof to a mathematical certainty. It doesn't mean proof beyond a shadow of a doubt. That's Alfred Hitchcock stuff." The judge went on to say, "[W]hat it means is this: that something is proved beyond a reasonable doubt, if after you've considered and compared all the evidence, you have in your minds a conviction to a moral certainty that the matter is true. A moral certainty, that means a subjective state of near certitude. Certitude is the state or the feeling of certainty."

While instructions emphasizing all the types of doubt that are not "reasonable doubt" might in some circumstances create a risk that the jury will understand the burden upon the Commonwealth to be less than it actually is, our courts have rejected challenges to burden-of-proof instructions containing each of the phrases used by the judge. See, e.g., *Commonwealth v. Webster*, 5 Cush. 295, 320 (1850) ("imaginary doubt"); *Commonwealth v. Watkins*, 433 Mass. 539, 547 n. 6 (2001) ("beyond all doubt"); *Commonwealth v. Schand*, 420 Mass. 783, 794 & n. 10 (1995) (same, and "fanciful doubt"); *Commonwealth v. Painten*, 429 Mass. 536, 545 (1999) ("all possible doubt"); *Commonwealth v. Mack*, 423 Mass. 288, 290–291 & n. 5 (1996) ("mathematical certainty"); *Commonwealth v. Denis*, 442 Mass. 617, 622 (2004) ("shadow of a doubt"); *Commonwealth v. Richardson*, 425 Mass. 765, 768 (1997) (same). The Supreme Judicial Court has held that contrasting "beyond a shadow of a doubt" with "beyond a reasonable doubt" is

EXHIBIT 2

"unlikely to be helpful to a jury," *Commonwealth v. Richardson, supra,* and we think that the reference to the former phrase being a Hollywood invention, too, might at least in some circumstances also tend to confuse the jury or weaken the burden of proof instruction. In this case, however, reading the jury charge as a whole, and particularly in light of the language that immediately follows the litany, which is quoted above, we do not think that a reasonable juror could have used the instruction incorrectly to require proof less than proof beyond a reasonable doubt. In the absence of error, there can be no substantial risk of a miscarriage of justice.

*2 The judge also gave an instruction, challenged by the petitioner, that "[n]ow you have heard the two qualified examiners and you will evaluate their testimony just the way you evaluate everybody else's testimony. If you decide that you don't give any weight whatsoever to the testimony of both of them, then you may not find Mr. Young sexually dangerous. In other words, you needn't find beyond a reasonable doubt on the testimony of one, but if you have no credibility—if neither of the witnesses—of the qualified examiners has any credibility in your collected minds, you may not find Mr. Young sexually dangerous on the basis of other evidence in the case. You don't have to believe either one of them beyond a reasonable doubt. You can use the other evidence in the case to corroborate their testimony, but if you don't believe them at all, either one of them, the two of them, then you may not find him sexually dangerous."

The petitioner argues that *Johnstone, petitioner,* 453 Mass. 544 (2009) (*Johnstone*), means that the qualified examiner (QE) testimony must, by itself, suffice to prove to the jury's satisfaction beyond a reasonable doubt that the petitioner is sexually dangerous. *Johnstone* does not by its terms address the degree to which a jury must credit the testimony at trial of a QE before they may find someone a sexually dangerous person, and we are not persuaded by the petitioner's argument. Indeed, the petitioner's position is in at least some tension with those aspects of *Johnstone* and the statute that appear to envision a place for additional evidence of sexual dangerousness at trial. See *Johnstone,* 453 Mass. at 553. While the phrasing of this portion of the instruction is a bit complex, we are not persuaded that any error it might contain created a substantial risk of a miscarriage of justice.

The petitioner also argues that the last sentence quoted above—"if you don't believe them at all, either one of them, the two of them, then you may not find him sexually dangerous "—would have been understood to mean that only in the absence of any belief in either QE were the jury permitted to render a verdict that the Commonwealth had not proven the petitioner sexually dangerous. We disagree. Read in context, it would not have been understood to suggest that this was the only circumstance in which a finding in favor of the petitioner was permissible. The petitioner again has not demonstrated a substantial risk of a miscarriage of justice.

Finally, the petitioner also argues that the Commonwealth's evidence failed to establish that his mental condition resulted in a general lack of power to control his sexual impulses. This same question was litigated before this court in a prior appeal from an earlier decision involving the same petitioner, see *Commonwealth v. Young,* 66 Mass.App.Ct. 1103 (2006). While we are not bound in this case by that decision, we are not persuaded that its reasoning is in error. Where there was evidence that the petitioner suffered from antisocial personality disorder, and that, as a result of that disorder, he committed not only the sexual offenses at issue here, but also engaged in other wrongful, uncharged sex-related conduct (for example, making obscene phone calls, including one in which he forced a woman to engage in sexual activity alone in her home on threat of doing violence to her husband), we think that there was sufficient evidence to support a finding beyond a reasonable doubt that the petitioner has a personality disorder that causes a general lack of power to control sexual impulses.

989 N.E.2d 557
83 Mass.App.Ct. 1137, 989 N.E.2d 557, 2013 WL 3064445 (Mass.App.Ct.)
(Table, Text in WESTLAW), Unpublished Disposition
(Cite as: 83 Mass.App.Ct. 1137, 2013 WL 3064445 (Mass.App.Ct.))

See G.L. c. 123A, § 1.

*3 *Judgment affirmed.*

Mass.App.Ct.,2013.
In re Young
83 Mass.App.Ct. 1137, 989 N.E.2d 557, 2013 WL 3064445 (Mass.App.Ct.)

END OF DOCUMENT

COMMONWEALTH OF MASSACHUSETTS

PLYMOUTH, ss.
[Unified Session at Suffolk]

SUPERIOR COURT DEPARTMENT
OF THE TRIAL COURT
UNIFIED SESSION NO.
SUCR2011-10838 (SDP)

JAMES GREEN,
Petitioner,

v.

COMMONWEALTH,
Respondent.

SUPPLEMENTAL MEMORANDUM IN SUPPORT OF COMMONWEALTH'S MOITON FOR A NEW TRIAL OR, IN THE ALTERNATIVE, FOR A STAY OF DISCHARGE PENDING APPEAL

The Commonwealth opposes the release of petitioner James Green pending resolution of the Commonwealth's appeal in this matter. To reiterate, the Commonwealth presents a meritorious issue on appeal and the petitioner poses both a flight risk and a threat to public safety for the reasons previously stated in the Commonwealth's memorandum in support of its motion for a new trial or, in the alternative, for a stay of discharge order pending appeal, dated March 20, 2015 (Commonwealth's memorandum). Additional considerations warrant the stay of discharge.

ADDITIONAL PROCEDURAL BACKGROUND

The Court, Pierce, J., heard oral argument on the Commonwealth's motion for a new trial or, in the alternative, for a stay of discharge order pending appeal on March 23, 2015. The Court denied the motion for a new trial and indicated that it was considering ordering Green released on conditions of supervision, if Green met certain preconditions. At the March 23 hearing, Green's trial counsel, Sondra Schmidt, informed the Court that Green would not be living with

his brother, Keith Green, upon release as the jury was informed. Rather, according to Ms. Schmidt, Green is seeking housing through the Greater Worcester Housing Connection, a Worcester shelter. The Court directed Ms. Schmidt to secure written documentation from the Greater Worcester Housing Connection that space was available for Green and other information relevant to Green's potential residency at this facility. The Court also directed Ms. Schmidt to provide written confirmation from the Worcester County Probation Department (Probation) to the effect that Probation was willing to supervise Green in this civil matter. Although Ms. Schmidt represented to the Court that she could provide the Court with the written confirmation in a matter of hours, the Commonwealth has not yet been provided with written confirmation from either the Greater Worcester Housing Connection or Probation.[1]

ARGUMENT

I. GREEN POSES A SUBSTANTIAL RISK TO REOFFEND.

Green's circumstances differ substantially from the facts on which the Court (Kottmyer, J.) relied in ordering another sexually dangerous person (SDP), George Souza, to be released pending the Commonwealth's appeal in that case. (For the Court's convenience, the Souza orders are attached.) For example,

- Green is only 56 years old. See Trial Ex. 4, p. 1.
- Green has no debilitating medical conditions that reduce his risk of reoffending. See Trial Ex. 4, p. 36; Trial Ex. 7, p. 11.
- Green has quite limited, if any, meaningful family support. Contrary to the evidence he offered at trial, Green, through counsel, has indicated that will not be living with his

[1] It is the Commonwealth's understanding that Probation has declined to supervise Green on this civil matter.

brother upon his initial release. And, Green's brother is himself a convicted felon who has served time in state prison and currently has an open criminal case for a charge of assault and battery with a dangerous weapon.

- Green has engaged in repetitive and compulsive sexual misconduct. See Trial Ex. 4, p. 36. He been convicted of violently sexually attacking women on three separate occasions for which he has served three separate state prison terms. He punched one victim. See Trial Ex. 4, p. 13. He threatened to kill another victim and beat her so severely that she suffered lacerations on her face and lacerations and abrasions to her elbow and hands. See Trial Ex. 4, p. 14. He bit another victim's hands and threatened to bite her ear off. Trial Ex. 4, p. 16. In sum, Green "threatened, punched, bit, choked and/or strangled" his victims, leaving them "bloodied and bruised." Trial Ex. 4, p. 36.
- Green has reoffended despite prior incarcerations and a prior evaluation for SDP commitment. After a 1991 conviction for indecent assault and battery on a person over fourteen years, Green was sentenced to five years in state prison. In 1998, he was convicted of rape and assault with intent to rape, for which he was sentenced to five years in prison. **Only twenty days** after release from his second state prison sentence, Green raped another woman. Following his convictions for rape and assault and battery, Green was sentenced to eight years in state prison. See, e.g., Trial Exs. 4, 7. Green reoffended despite undergoing an evaluation for potential commitment as an SDP in 1987.
- Green's victim pool is extensive: he has sexually assaulted one female acquaintance and two female strangers. See, e.g., Trial Ex. 2; Trial Ex. 4, pp. 34, 36. It is a practical impossibility to restrict Green's access to his wide victim pool through probationary

conditions. Green targeted his victims "because they were 'vulnerable' and because he 'could use their addiction against them.'" Trial Ex. 7, p. 46. "The fact that he chose victims who were drug addicted and more vulnerable demonstrates the predatory nature of his offending." Trial Ex. 4, p. 34. And, "as recently as July 2014," Green "continued to engage in sexual fantasies about prostitutes, his victim pool, which would reinforce his sexual arousal towards them." Trial Ex. 4, p. 34.

- Green has reported that he reoffended when his living conditions were unstable. See, e.g., Trial Ex. 4, pp. 13-16. For example, Green stated that, at the time of the 1991 sexual offense, he had been kicked out of a sober house and was living in a rooming house. See Trial Ex. 4, p. 13. According to Green, at the time of the 1997 sexual offense, he was living in a shelter. Trial Ex. 4, p. 15. And, according to Green, he committed the 2002 sex offense after he was left homeless when his father would not permit him to stay in the father's home while the father was on vacation. Despite having completed two phases of the prison sex offender treatment program during his incarceration, Green reoffended only twenty days after his release from prison. Trial Ex. 4, p. 16.
- While age may reduce risk for some sex offenders, Green reoffended in his 40s. Trial Ex. 7, p. 50.
- Green suffers from a mental abnormality and a a personality disorder as defined by statute. See, e.g., Trial Ex. 4, p. 36; Trial Ex. 7, pp. 48-49.
- Green is at high risk to reoffend based on the Static-99R. See, e.g., Trial Ex. 4, pp. 33-34. He also presents with a number of dynamic risk factors including a "lack of social supports, intimacy deficits, hostility towards women, lack of concern for others,

impulsivity, issues with authority, difficulty with problem-solving, negative emotionality (anger), poor sexual self-regulation and using sex to cope, deviant sexual arousal, and poor cooperation with supervision." Trial Ex. 4, p. 34. He "continues to show a lack of integration" of the material in sex offender treatment. Trial Ex. 4, p. 34.

- Green has an extensive criminal history apart from his sexual offenses. See, e.g., Trial Ex. 4, pp. 8-9.

II. THE COURT LACKS THE AUTHORITY TO IMPOSE PROBATIONARY CONDITIONS.

The Commonwealth does not agree that the Court has the authority to impose probationary conditions on Green in the circumstances present here. The Appeals Court in *Souza, petitioner*, __ Mass. App. Ct. __, 2015 WL 1214608, did not reach this issue. *See id.* at *7 n. 12.

General Laws c. 276, § 87 does not permit release on probation conditions in this civil SDP proceeding. Rather, this statute limits probation to persons charged with "an offense or a crime" or to persons "after a finding or verdict of guilty." *See* G.L. c. 276, § 87. Likewise, G.L. c. 123A does not provide for the imposition of conditions of release after an individual has been adjudicated to be sexually dangerous and later declared not sexually dangerous. An earlier version of G.L. c. 123A, § 9 permitted imposition of conditions of release following the adjudication of an individual as no longer sexually dangerous. *See* G.L. c. 123A, § 9, as appearing in St. 1966, c. 608. The SJC held that recommitment of an individual as an SDP under this statutory provision was unconstitutional. *See Commonwealth v. Travis*, 372 Mass. 238, 246-247 (1977). The SJC noted that the Legislature could authorize a court to impose conditions of release by allowing release of an SDP on probation as long as the conditional release was not

predicated on a finding that the person is no longer sexually dangerous. Id. at 251. *See also Conlan v. Commonwealth*, 383 Mass. 871, 872 (1981) (holding that judge has no authority to order conditional or gradual release of person from the Treatment Center absent a finding that the person is no longer sexually dangerous).

In *Commonwealth v. Knapp*, the SJC considered whether G.L. c. 123A permits the release of a person on probationary conditions after a judge has found probable cause to believe that the person is sexually dangerous. 441 Mass. 157 (2004). The Court held that G.L. c. 123A requires that such a person be confined in a secure facility until the conclusion of the SDP trial. *Id.* at 158. Prior to the probable cause determination, a court may only commit the individual to the Treatment Center or release the person. *Id.* at 161; *see* G.L. c. 123A, § 12(e). After a finding of probable cause, however, the statute deprives the judge of discretion to release the person pending trial. *Id.* at 161-162, *citing* G.L. c. 123A, §§ 13, 14.

In *Commonwealth v. Parra*, the SJC considered the Commonwealth's appeal of an order dismissing an initial SDP commitment petition where the mandatory time limits of G.L. c. 123A were not observed. 445 Mass. 262 (2005). The SJC noted that the Superior Court was without authority to release Parra after the probable cause hearing. *Id.* at 267. The SJC heard oral argument on September 7, 2005. Five days later, the SJC ordered Parra's release pending the outcome of the appeal "on appropriate conditions to be determined after a hearing before a judge in the Superior Court." *Id.* at 266 n. 5. Unlike Souza, however, Parra had <u>not</u> been adjudicated to be sexually dangerous.

In *Commonwealth v. Gagnon*, 439 Mass. 826, 829-830 (2003), the trial judge contemplated releasing a person subject to an SDP commitment petition pending the

Commonwealth's appeal of a motion to dismiss. The trial judge inquired into conditions of probation that had already been imposed on Gagnon as a part of the sentences for earlier criminal offenses. *Id.* *Gagnon* does not stand for the proposition that a trial judge in circumstances such as the present one may impose conditions of release.

Accordingly, the Court should order that Green's discharge be stayed pending the Commonwealth's appeal. As stated in its previously filed memorandum, the Commonwealth presents a strong issue on appeal based on the *Souza* decision. In light of its meritorious ground for appeal and the fact that Green presents a substantial threat to public safety, this Court should stay Green's discharge pending appeal.

III. THE COURT SHOULD STAY THE DISCHARGE TO PERMIT THE COMMONEALTH TO SEEK APPELLATE REVIEW OF ITS ORDER.

In the alternative, the Commonwealth respectfully requests that this court stay the discharge order for one week to permit the Commonwealth to seek a stay from the appellate courts.

Respectfully Submitted

By the Commonwealth,

NANCY ANKERS WHITE
Special Assistant Attorney General

by: _____
Sabine M. Coyne, Counsel
Department of Correction
Massachusetts Treatment Center
30 Administration Road
Bridgewater, Massachusetts 02324
(508) 279-8147
BBO Number 632968

Dated: March 25, 2015

CERTIFICATE OF SERVICE

I hereby certify that I did this day serve a photocopy of the above document upon the petitioner to his counsel, Sondra Schmidt, by hand.

Dated: March 25, 2015

Mary P. Murray

SUPREME JUDICIAL COURT
for the Commonwealth
Case Docket

COMMONWEALTH vs. DANIEL PARRA
SJC-09552

CASE HEADER

Case Status	Decided (Full Opinion)	**Status Date**	11/02/2005
Nature	S.D.P. petition c 123A	**Entry Date**	07/27/2005
Appellant	Plaintiff	**Case Type**	Civil
Brief Status		**Brief Due**	
Quorum	Marshall, C.J., Greaney, Ireland, Spina, Cowin, Sosman, Cordy, JJ.		
Argued Date	09/07/2005	**Decision Date**	11/02/2005
AC/SJ Number	2005-P-0983	**Citation**	445 Mass. 262
DAR/FAR Number		**Lower Ct Number**	2005-J-307
Lower Court	App.Ct. Single Justice ES	**Lower Ct Judge**	Gary S. Katzmann, J.
Route to SJC	Sua Sponte Transfer from Appeals Court		

ADDITIONAL INFORMATION

Add'l Trial Court docket nos.: ESCV2003-00515
Appeals Court Single Justice file was transferred with case. (With Clerk's file)

INVOLVED PARTY	ATTORNEY APPEARANCE
Commonwealth Plaintiff/Appellant 18 Main Br.	Andrew Joseph Camelio, A.D.A. Valerie A. DePalma, A.D.A. Inactive
Daniel Parra Defendant/Appellee Red brief & appendix filed 18 Main Br.	David Hirsch, Esquire

DOCKET ENTRIES

Entry Date	Paper	Entry Text
07/27/2005	#1	Entered and Argument Month scheduled. Notice to counsel.
07/27/2005		Transferred from Appeals Court: Full set of briefs and Appendix.
08/03/2005	#2	MOTION to Vacate Stay of Trial Court's Order Dismissing Petition, filed for Daniel Parra by David Hirsch, Esquire.
08/08/2005	#3	ORDER: Paper #2 (Motion to Vacate Stay of Trial Court's Order Dismissing Petition) DENIED By the court. Notice to Counsel.
08/08/2005	#4	Additional 5 copies of brief w/appendix filed by Commonwealth. (Sent in 3 packages, mailed at different times.)
08/08/2005	#5	MOTION TO IMPOUND brief filed for Commonwealth by Andrew Joseph Camelio, A.D.A.. (Noted)
08/09/2005	#6	SERVICE of brief w/supplemental appendix for Defendant/Appellee Daniel Parra by David Hirsch, Esquire.
08/09/2005	#7	Additional 12 copies of brief filed by Commonwealth. (2nd and 3rd mailed package of briefs).
09/07/2005		Oral argument held. (CJM G I S C SN CY).
09/07/2005	#8	MOTION to vacate stay of trial court's order dimissing petition, filed for Daniel Parra by David Hirsch, Esquire.

09/12/2005	#9	ORDER (By the Court): The respondent shall be released pending the outcome of this appeal, or until further order of this Court, on appropriate conditions to be determined, after hearing, by a judge in the Superior Court. Notice to counsel and trial court. s.m.
11/02/2005	#10	RESCRIPT (Full Opinion): The judgment of dismissal is affirmed. (By the Court). Reasons as on file. Notice sent.
11/30/2005		RESCRIPT ISSUED to trial court.

As of 12/01/2007 01:02

COMMONWEALTH OF MASSACHUSETTS

PLYMOUTH, ss.
[Unified Session at Suffolk]

SUPERIOR COURT DEPARTMENT
OF THE TRIAL COURT
UNIFIED SESSION NO.
SUCR2011-10838(SDP)

JAMES GREEN,
Petitioner,

v.

COMMONWEALTH,
Respondent.

NOTICE OF APPEAL

The Commonwealth hereby appeals from the judgment, jury charge, jury verdict and certain rulings of the Superior Court including but not limited to the denial of the Commonwealth's motion for a new trial or, in the alternative, for a stay of discharge pending appeal.

Respectfully Submitted

By the Commonwealth

NANCY ANKERS WHITE
Special Assistant Attorney General

by: _____
Mary P. Murray, Supervising Counsel
Department of Correction
Massachusetts Treatment Center
30 Administration Road
Bridgewater, Massachusetts 02324
(508) 279-8184
BBO Number 555215
e-mail: mary.murray@massmail.state.ma.us

Dated: April 3, 2015

CERTIFICATE OF SERVICE

I hereby certify that I did this day serve a photocopy of the above document upon the petitioner to his counsel, Sondra Schmidt, by hand.

Dated: April 3, 2015

Mary P. Murray

COMMONWEALTH OF MASSACHUSETTS

PLYMOUTH, ss. **APPEALS COURT**
No. _____

JAMES GREEN,
Petitioner,

v.

COMMONWEALTH,
Respondent.

MOTION FOR STAY PENDING APPEAL

The Commonwealth of Massachusetts hereby requests, pursuant to Mass. R. App. P. 6(a), that this Court stay the petitioner's release from custody, pending the resolution of the Commonwealth's appeal from a jury's verdict, issued in *James Green v. Commonwealth*, PLCV2011-00918, SUCR2011-10838. Exs. 1, 2. On April 3, 2015, the trial judge, Laurence Pierce, denied the Commonwealth's motion to stay pending appeal and ordered the petitioner to be released on April 8, 2015. See Ex. 3. As grounds, the Commonwealth states that it has a reasonable likelihood of success on appeal, and that the petitioner's release poses both a risk to the public and a risk of flight.

PRIOR PROCEEDINGS

Petitioner James Green was civilly committed as a sexually dangerous person (SDP) in July 2011. Ex. 4, p. 1.[1] The next month, Green filed a G.L. c. 123A, § 9 petition for discharge.

[1] The Commonwealth is attaching the reports of the qualified examiner and Community Access Board, along with the curriculum vitae of each expert it called. These documents were admitted in evidence. The reports were admitted in redacted form. For purposes of this motion, the Commonwealth has redacted only the identifying information about victims and the

Exs. 1, 2. The petition was filed in Plymouth County, the county from which Green's SDP commitment originated. Ex. 1. The petition was thereafter transferred to the Unified Session in Suffolk Superior Court, where it was managed through trial, as is the practice with respect to G.L. c. 123A, § 9 petitions. Exs. 1, 2. As permitted by G.L. c. 123A, § 9, the Commonwealth requested a jury trial. Ex. 2.

A jury trial was held in Suffolk Superior Court before Associate Justice Laurence Pierce in March 2015. Ex. 2. At the trial, the Commonwealth offered expert opinions from two witnesses: Nancy Connolly, Psy.D., a qualified examiner (QE);[2] and Angela Johnson, Psy.D., a member of the Community Access Board (CAB),[3] a licensed psychologist and a QE. See Exs. 5, 6. Dr. Connolly opined that Green remained sexually dangerous. Ex. 4, pp. 36-37. The CAB unanimously opined that Green remains sexually dangerous. Ex. 7, pp. 1, 47-50. The petitioner offered expert opinions from three witnesses: Margery Gans, Ed.D., the other QE; and two privately retained psychologists. He also offered testimony from some lay witnesses.

The Commonwealth offered ample evidence on every essential element of sexual dangerousness. See, e.g., Exs. 4, 7. The trial judge agreed and denied the petitioner's motion for a directed verdict and his renewed motion for a directed verdict. See Ex. 2.

---

petitioner's birth date. The Commonwealth has also redacted the petitioner's birth date and social security number from exhibit 11.

[2] As defined in G.L. c. 123A, § 1, a qualified examiner must either be a physician, licensed and certified in either psychiatry or neurology, or a licensed psychologist, with at least two years experience with the diagnosis or treatment of sexually aggressive offenders and be appointed by the Commissioner of Correction. A qualified examiner need not be a Department of Correction (DOC) employee. G.L. c. 123A, § 1. The qualified examiners' reports "shall be admissible" in a § 9 trial. G.L. c. 123A, § 9.

[3] Pursuant to G.L. c. 123A, §§ 1, 6A, the CAB is a five-member board, including three DOC employees and two consulting members. The CAB annually evaluates the current sexual dangerousness of each SDP. *See* G.L. c. 123A, § 6A. The CAB's report "shall be admissible" at a § 9 proceeding. *Id.*

Over the Commonwealth's objection,[4] the Court instructed the jury:

> In order to find Mr. Green is a sexually dangerous person, you must credit the opinion of Dr. Nancy Connolly who testified in her capacity as a Qualified Examiner and opined that Mr. Green is a sexually dangerous person as defined in the law at the present time. It is not required that you accept all of the reasons given by Dr. Connolly for her opinion; you may find support for the opinion anywhere in the evidence, including the testimony of Dr. Angela Johnson, the [Community Access Board or "CAB"] representative. However, you cannot find that Mr. Green is a sexually dangerous person today unless you credit the opinion of Dr. Connolly that Mr. Green suffers from a mental condition that causes him serious difficulty in controlling his sexual impulses at the present time.

See Ex. 3, pp. 1-2. The jury began its deliberations on March 17, did not reach a verdict and returned the next day to continue deliberations. Ex. 3, p. 2.

While the jury was deliberating on March 18, the Appeals Court issued its opinion in *Souza, petitioner*, 87 Mass. App. Ct. 162, 2015 WL 1214608 (a copy of which is attached as Ex. 9). The Commonwealth made an oral motion requesting the trial judge to reinstruct the deliberating jury in accordance with the *Souza* decision. The trial judge denied the Commonwealth's motion. See Ex. 3, p. 3.[5]

Later that day, the jury returned its verdict that Green is no longer sexually dangerous. The Commonwealth moved orally to stay Green's discharge pending the Commonwealth's appeal. See Ex. 3, p. 4. The trial judge conducted additional hearings. See Ex. 3, pp. 4-5. On April 3, 2015, the trial judge denied the Commonwealth's motion for a new trial or, in the alternative, for a stay of discharge pending appeal. See Ex. 3, p. 6. The trial judge ordered

---

[4] For example, the Commonwealth filed a written objection to the proposed instruction. See Ex. 8. The Commonwealth also objected orally.

[5] The trial judge stated that he denied the motion because (1) the case "had been tried with the understanding that the CAB limiting instruction would be given" ; (2) the trial judge believed that reinstructing the jury would have required the jury to begin its deliberations anew; and (3) the trial judge believed that reinstructing by omitting one paragraph from the original instructions "had the potential for confusing the jury and distracting it from a fair consideration of all the evidence." Ex. 3, pp. 3-4.

Green to be released from the Massachusetts Treatment Center (Treatment Center) but stayed the order until April 8, 2015, to permit the Commonwealth to seek review by a single justice of this Court. See Ex. 3, p. 6. The Commonwealth filed its notice of appeal on April 3, 2015. See Ex. 10.

STATEMENT OF FACTS

I. Green's Criminal History and SDP Commitment

Green, age 56, has a long criminal history beginning at age 21 and continuing until his most recent confinement at age 44. Ex. 7, pp. 2, 48. He has been convicted of sexually attacking three different women on three different occasions.

1991 Sexual Attack on an Acquaintance

In 1991, Green sexually assaulted a 23-year-old female acquaintance. Ex. 4, pp. 10, 13. Green invited the woman to his apartment to use cocaine. Ex. 4, p. 13. When the victim attempted to leave, Green choked and dragged the screaming victim back into the room. Ex. 4, p. 13. Green locked the door to prevent others from coming to the victim's aid. Ex. 4, p. 13. He punched the victim in the eye, raped her and prevented her from leaving until morning. Ex. 4, p. 13. He was convicted of indecent assault and battery and sentenced to five years in prison. Ex. 4, p. 10. Companion charges of rape and kidnapping were dismissed and charges of assault and battery and possession of a controlled substance were (guilty) filed. Ex. 4, p. 10. Green was discharged from confinement on this sentence on October 3, 1993. Ex. 4, p. 10.

1997 Sexual Attack on a Stranger

Less than four years later in June 1997, Green was charged with rape, assault to rape and assault and battery. Ex. 4, p. 10. Green attacked the victim, a 41-year-old stranger, as she tried to open the front door of her apartment. Ex. 4, pp. 10, 14. He dragged her down a basement

stairwell where he forced the victim to perform oral sex on him, saying "'Suck it bitch or I'll kill you.'" Ex. 4, p. 14. Green punched the victim about the head and face and began to choke her. Ex. 4, p. 14. He vaginally raped the victim. Ex. 4, p. 14. The victim broke free and crawled to the courtyard of the apartment complex where Green again attacked her. Ex. 4, p. 14. Green was "'on top of the victim with his penis out when he was dragged off the victim by neighbors.'" Ex. 4, p. 14. Neighbors surrounded Green and prevented him from leaving until the police arrived. Ex. 4, p. 14. The victim, who was wearing a leg brace, was bleeding and suffered lacerations to her face, elbows and hands. Ex. 4, p. 14.

In 1998, Green was convicted of rape and assault to rape while the charge of assault and battery was (guilty) filed. Ex. 4, p. 10. Green was released from this sentence on May 11, 2002. Ex. 4, p. 10.

2002 Sexual Attack on a Stranger

Twenty days later, Green raped a 30-year-old female stranger. Ex. 4, p. 10. Green led the victim into the woods to smoke "some crack." Ex. 4, p. 15. While in the woods, Green lunged at the victim, grabbed her neck and forced her to suck his penis. Ex. 4, p. 15. He punched the victim in the side of the head. Ex. 4, p. 15. Green told the victim that he "had an 'incredible urge' to bite her ear off." Ex. 4, p. 16. Green bit the victim's hands and choked her until she could not breathe. Ex. 4, p. 16. When the victim heard her brother nearby, she screamed and ran to her brother. Ex. 4, p. 15. Green fled and was later apprehended. Ex. 4, p. 15.

Green was convicted of rape and assault and battery. Ex. 4, p. 10. A companion charge of being a habitual offender was dismissed after plea. Ex. 4, p. 10. Prior to Green's release from incarceration, the District Attorney for Plymouth County filed a petition seeking to commit

Green as an SDP. See Ex. 4, p. 10. Green was held at the Treatment Center pending the disposition of the SDP commitment petition. See Ex. 4, p. 10. He was adjudicated sexually dangerous in July 2011. Ex. 4, p. 10.

II. Green's Present Sexual Dangerousness

Green has committed repetitive sexual offenses. Ex. 4, p. 36; Ex. 7, p. 49. His behavior has been compulsive, as evidenced by the fact that he "sexually assaulted more than one woman on more than one occasion, and his governing offense took place within a month of his release from prison on a previous sexual assault." Ex. 7, p. 49.

Green presents with a statutorily defined mental abnormality and a statutorily defined personality disorder. Ex. 4, p. 36; Ex. 7, p. 48. He suffers from an other specified personality disorder with antisocial traits. Ex. 4, p. 33; Ex. 7, p. 49. This personality disorder "has resulted in compulsive sexual misconduct towards women." Ex. 4, p. 36; see Ex. 4, p. 33. His offenses "all involved preying on vulnerable women. His offenses demonstrate aggression, impulsivity, disregard for the safety of others, and a lack of remorse, in that he has rationalized his actions because the women were 'common street walkers.'" Ex. 7, p. 49.

Green presents with numerous risk factors that increase his risk for sexual reoffense. Ex. 4, p. 33. Green scores in the high risk category on the Static-99R, an "actuarial risk assessment scale designed to predict sexual and violent recidivism." Ex. 4, p. 33. Green also presents with dynamic risk factors including lack of social supports, intimacy deficits, hostility towards women, lack of concern for others, impulsivity, issues with authority, difficulty with problem-solving, negative emotionality (anger), poor sexual self-regulation and using sex to cope, deviant sexual arousal, and poor cooperation with supervision. Ex. 4, p. 34. See Ex. 7, p. 49.

While Green has participated in sex offender treatment, he "continues to show a lack of integration of the material." Ex. 4, p. 34. Green has worked on some issues in treatment but "overestimates his progress and then becomes defensive about feedback." Ex. 4, p. 35. He has "developed a limited understanding of his offending that continues to externalize responsibility. He has not integrated his understanding of his sexual offending to sufficiently alter his behavior." Ex. 4, p. 35. See Ex. 7, p. 50. "He continues to blame the victims of the offenses by suggesting and repeating that they were prostitutes that were not keeping up their end of an agreement to exchange sex for drugs. The fact that he chose victims who were drug addicted and more vulnerable demonstrates the predatory nature of his offending." Ex. 4, p. 34. Further, "the excessive force" that Green used while "sexually assaulting these women shows either a blatant disregard for the potential injury to them or deviant sexual arousal towards violence (or both)." Ex. 4, p. 34.

As recently as July 2014, Green "continued to engage in sexual fantasies about prostitutes, his victim pool, which would reinforce his sexual arousal towards them." Ex. 4, p. 34. Green has not explored deviant sexual arousal toward violence in treatment and "his denials about feeling sexually aroused while raping women lacks credibility. Victims reported that Mr. Green punched, bit, choked, and strangled them until they could not breathe (one victim reported losing consciousness); victims were bruised and bloodied during the sexual assaults and Mr. Green continued to sexually assault them." Ex. 4, p. 35. See Ex. 7, p. 50 ("Mr. Green has not yet addressed the violence and brutality he inflicted on his victims, and how he was able to terrorize and dehumanize them.").

While serving his criminal sentence, Green incurred disciplinary reports for "problems with authority, fighting and possession of pornography." Ex. 7, p. 49. Despite participating in

sex offender treatment, he "has struggled with attitudes and behaviors that indicate ongoing antisociality." Ex. 7, p. 49. In April 2012, Green was involved in a fight with his roommate where "he gave the other man a 'black eye', resulting in his suspension from treatment." Ex. 7, p. 49. More recently, Green was placed on an individual behavior plan for inappropriate behaviors in sex offender treatment, "including making a sexually inappropriate hand gesture to another resident and being verbally aggressive with his peers." Ex. 7, p. 49. As the CAB noted, "[i]t is concerning to the Board, that Mr. Green is still engaging in behaviors that seem driven by the same thoughts and feelings that were present during the time of his offending." Ex. 7, p. 49.

Green's "social support network is weak and his ability to develop new, prosocial relationships is weak." His medical history "does not indicate any significant medical condition that would affect his capacity to re-offend." Ex. 4, p. 36. Green intends to live in a homeless shelter upon release from the Treatment Center. See Exs. 11, 12.[6] Green has reported that he reoffended when his living conditions were unstable. See, e.g., Ex. 4, pp. 13-16. For example, Green stated that, at the time of the 1991 sexual offense, he had been kicked out of a sober house and was living in a rooming house. See Ex. 4, p. 13. According to Green, at the time of the 1997 sexual offense, he was living in a shelter. Ex. 4, p. 15. And, according to Green, he committed the 2002 sex offense after he was left homeless when his father would not permit him to stay in the father's home while the father was on vacation. Ex. 4, pp. 16-17.

Green has no conditions of probation upon discharge.[7] See Ex. 13, p. 4, ¶ 4.

---

[6] While there was some evidence at trial that Green would live with a brother upon his initial release, Green has since indicated that he would be living at a shelter in Worcester or in Boston. See Exs. 11, 12 (appended without attachments).

[7] The trial judge has concluded that he has no authority to order Green to be supervised by Probation in this civil proceeding. See Ex. 3, pp. 5-6. See also Ex. 13.

ARGUMENT

I. THE COMMONWEALTH HAS A REASONABLE LIKELIHOOD OF SUCCESS ON APPEAL WHERE THE TRIAL JUDGE ERRED IN INSTRUCTING THE JURY.

This Court may stay Green's release pending appeal. *See Wyatt, petitioner*, 428 Mass. 347, 349 (1998) (Appeals Court single justice stayed discharge after petitioner found no longer sexually dangerous); *Hill, petitioner*, 422 Mass. 147, 151, *cert. denied*, 519 U.S. 867 (1996) (same).[8] *See also Commonwealth v. Gagnon*, 439 Mass. 826, 829 (2003) (when Commonwealth files timely appeal from allowance of motion to dismiss in an SDP case, "a judge may enter a stay that results in further detention."); *Commonwealth v. Nassar*, 380 Mass. 908, 909 (1980) (in c. 123 commitment case, judge issued a stay of judgment for release, leading to continued confinement, so that judge could report question regarding statutory construction to appellate court). The Court should exercise that authority here.

Precedent exists for allowance of the Commonwealth's motion for stay. In other cases where the Commonwealth raised issues worthy of appellate consideration and the Commonwealth stated public safety concerns and the risk of loss of jurisdiction if a stay were denied, a single justice of the Appeals Court stayed the petitioner's release pending appeal. *See Wyatt*, 428 Mass. at 349; *Hill*, 422 Mass. at 151.

As this case involves the potential release from the Treatment Center, a DOC facility, it is useful to consider the factors that are utilized in deciding whether to stay a decision in a criminal

---

[8] For the Court's information, the Commonwealth attaches copies of the Order of the Single Justice of the Appeals Court and the Order of the Single Justice of the Supreme Judicial Court in *Wyatt*. See Exs. 14, 15.

case. In the context of a stay of execution of a criminal sentence, the court must examine two categories of consideration.

First, the Commonwealth presents an "'issue which is worthy of presentation to an appellate court, one which offers some reasonable possibility of a successful decision in the appeal.'" *Commonwealth v. Hodge*, 380 Mass. 851, 855 (1980), *quoting Commonwealth v. Allen*, 378 Mass. 489, 498 (1979) (citation omitted); *see Commonwealth v. Levin*, 7 Mass. App. Ct. 501, 504 (1979) ("the standard of 'reasonable success on appeal' is not one of substantial certainty of success, but rather is one equivalent to the civil concept of 'meritorious appeal;' that is, an appeal which presents an issue which is worthy of presentation to an appellate court, one which offers some reasonable possibility of a successful decision in its appeal"). *See Gagnon*, 439 Mass. at 829-830 (record suggests that judge, in SDP case, considered various factors including defendant's circumstances, including probation in criminal case, if he were to be discharged and strength of Commonwealth's appeal).

Second, the court must also consider security factors such as the likelihood of flight, the potential danger to any person or the community and the likelihood of further criminal acts during the pendency of the appeal. *Hodge*, 380 Mass. at 855; *Levin*, 7 Mass. App. Ct. at 505. Applying the *Levin/Hodge/Allen* analysis to the present case, it is clear that the Commonwealth satisfies both factors. The Commonwealth raises an issue that merits appellate consideration and articulates compelling concerns for public safety to warrant a stay pending appeal.

The trial judge erred in instructing the jury, based on an incorrect reading of *Johnstone, petitioner*, 453 Mass. 544, 553 (2009). As this Court recently stated when reviewing a similar instruction in *Souza*:

> We agree with the Commonwealth that such an instruction is not compelled by Johnstone, and that **it is otherwise inadvisable.** Johnstone held only that the

> Commonwealth cannot continue to pursue SDP confinement of someone unless at least one of the two assigned QEs concludes that the person is an SDP. [citation omitted]. That precondition was satisfied here. As the judge herself recognized, in determining whether someone is an SDP, jurors are not precluded from relying on evidence from non-QE sources. The judge's efforts to acknowledge this to the jury, while still trying to create a special evidentiary role for the QE, led to an instruction that was confusing at best and **not a fair statement of the law.** Where, as here, the gatekeeping role served by QEs has been satisfied, and the Commonwealth offers additional expert testimony, **a trial judge should refrain from suggesting the relative weight the jury can or should assign to the various Commonwealth experts.**

Souza at *7 (emphasis added).[9] *See also Young, petitioner*, Memorandum and Order Pursuant to Rule 1:28, 83 Mass. App. Ct. 1137, 2013 WL 3064445 *2 (attached as Ex. 16) (noting that (1) "*Johnstone* does not by its terms address the degree to which a jury must credit the testimony at trial of a QE before they may find someone [to be] a [SDP];" and (2) SDP's argument that the QE testimony must, by itself, suffice to prove beyond a reasonable doubt that the person is sexually dangerous "is in at least some tension with those aspects of *Johnstone* and the statute that appear to envision a place for additional evidence of sexual dangerousness at trial").

The trial judge concluded that "assuming that the limiting instruction was erroneous," "it was unlikely to have affected the jury's verdict. The Petitioner had served substantial prison sentences after criminal convictions and had been confined to the Treatment Center for

---

[9] In *Souza,* the trial judge instructed the jury that:

> You heard of testimony from Dr. Tomich, a representative of the community access board. The law permits a representative of the community access board to testify in all proceedings like this one, and you may certainly rely upon the testimony of Dr. Tomich. However, you cannot find that the petitioner, Mr. Souza, is sexually dangerous based solely on the testimony of Dr. Tomich. In order for you to find that Mr. Souza is today a sexually dangerous person, you must find support for that determination in the opinion that [sic] Dr. Kelso, who testified as a qualified examiner.

Souza at *7.

approximately four years. The qualified examiner who testified for the Commonwealth was effectively cross-examined regarding her opinion that the Petitioner remained sexually dangerous and the Petitioner's expert witness testified plausibly that he had effectively undertaken treatment at the Treatment Center and that he was no longer sexually dangerous." Ex. 3, p. 5. In fact, the trial judge's assessment actually demonstrates the prejudicial harm flowing from the incorrect instruction. The instruction was particularly prejudicial to the Commonwealth because Green's attorney argued to the jury that they should reject Dr. Connolly's opinion in its entirety.

In light of *Souza,* there can be no doubt that the Commonwealth presents a meritorious issue on appeal.[10] This is so even though the formal rescript has not issued in *Souza, see* Mass. R. App. P. 23, and the Commonwealth is aware that Souza has indicated an intention to seek further appellate review by the Supreme Judicial Court. *See Souza, petitioner*, Appeals Court No. 13-P-1052 (docket entry 18).

II. PUBLIC SAFETY COMPELS THE STAY OF THE DISCHARGE ORDER.

Security factors such as the likelihood of flight, the potential danger to any person or the community and the likelihood of further criminal acts during the pendency of the appeal weigh in favor of the stay. *See Hodge*, 380 Mass. at 855; *Levin*, 7 Mass. App. Ct. at 505. Relevant considerations include familial status, roots in the community, prior criminal record and general attitude and demeanor. *Hodge*, 380 Mass. at 855; *Levin*, 7 Mass. App. Ct. at 505.

---

[10] The trial judge concluded that "assuming that the limiting instruction was erroneous," "it was unlikely to have affected the jury's verdict. The Petitioner had served substantial prison sentences after criminal convictions and had been confined to the Treatment Center for approximately four years. The qualified examiner who testified for the Commonwealth was effectively cross-examined regarding her opinion that the Petitioner remained sexually dangerous and the Petitioner's expert witness testified plausibly that he had effectively undertaken treatment at the Treatment Center and that he was no longer sexually dangerous." Ex. 3, p. 5. In fact, the trial judge's assessment actually demonstrates the prejudicial harm flowing from the incorrect instruction.

Green's confinement for more than a decade as an inmate and an SDP coupled with the prospect of continuing his day-to-life civil commitment pose powerful incentives for him to flee the Commonwealth while awaiting resolution of the Commonwealth's appeal. If the Commonwealth prevails on appeal and Green has already been discharged from the Treatment Center, it will be difficult if not impossible to insure his return to civil commitment. Green has fully served his criminal sentence and is not subject to any probationary period under his criminal conviction. See Ex. 13, p. 4, ¶ 4. And, the trial judge concluded that he is without authority to impose probation conditions in this civil proceeding. See Ex. 3, p. 6. Releasing Green will also disrupt the treatment that he is now receiving.

Important considerations of public safety compel the stay pending resolution of the Commonwealth's appeal. He remains a substantial threat to public safety if released.

- Green is only 56 years old. See Ex. 4, p. 1.
- Green has no debilitating medical conditions that reduce his risk of reoffending. See Ex. 4, p. 36; Ex. 7, p. 11.
- Green has quite limited, if any, meaningful family support. Green, through counsel, has indicated that will not be living with his brother upon his initial release. And, as the evidence at trial showed, Green's brother is himself a convicted felon who has served time in state prison and currently has an open criminal case for a charge of assault and battery with a dangerous weapon.
- Green has engaged in repetitive and compulsive sexual misconduct. See Ex. 4, p. 36. He been convicted of violently sexually attacking women on three separate occasions for which he has served three separate state prison terms. He punched one victim. See Ex. 4, p. 13. He threatened to kill another victim and beat her so severely that she suffered

lacerations on her face and lacerations and abrasions to her elbow and hands. See Ex. 4, p. 14. He bit another victim's hands and threatened to bite her ear off. Ex. 4, p. 16. In sum, Green "threatened, punched, bit, choked and/or strangled" his victims, leaving them "bloodied and bruised." Ex. 4, p. 36.

- Green has reoffended despite prior incarcerations. After a 1991 conviction for indecent assault and battery on a person over fourteen years, Green was sentenced to five years in state prison. In 1998, he was convicted of rape and assault with intent to rape, for which he was sentenced to five years in prison. **Only twenty days** after release from his second state prison sentence, Green raped another woman. Following his convictions for rape and assault and battery, Green was sentenced to eight years in state prison. See, e.g., Exs. 4, 7.
- Green's victim pool is extensive: he has sexually assaulted a female acquaintance and female strangers. Green targeted his victims "because they were 'vulnerable' and because he 'could use their addiction against them.'" Ex. 7, p. 46. "The fact that he chose victims who were drug addicted and more vulnerable demonstrates the predatory nature of his offending." Ex. 4, p. 34. And, "as recently as July 2014," Green "continued to engage in sexual fantasies about prostitutes, his victim pool, which would reinforce his sexual arousal towards them." Ex. 4, p. 34.
- Green has reported that he reoffended when his living conditions were unstable. See, e.g., Ex. 4, pp. 13-16. For example, Green stated that, at the time of the 1991 sexual offense, he had been kicked out of a sober house and was living in a rooming house. See Ex. 4, p. 13. According to Green, at the time of the 1997 sexual offense, he was living in a shelter. Ex. 4, p. 15. And, according to Green, he committed the 2002 sex offense after

he was left homeless when his father would not permit him to stay in the father's home while the father was on vacation. Despite having completed two phases of the prison sex offender treatment program during his incarceration, Green reoffended only twenty days after his release from prison. Ex. 4, p. 16.

- While age may reduce risk for some sex offenders, Green reoffended in his 40s. Ex. 7, p. 50.
- Green suffers from a mental abnormality and a personality disorder as defined by statute. See, e.g., Ex. 4, p. 36; Ex. 7, pp. 48-49.
- Green is at high risk to reoffend based on the Static-99R. See, e.g., Ex. 4, pp. 33-34. He also presents with a number of dynamic risk factors including a "lack of social supports, intimacy deficits, hostility towards women, lack of concern for others, impulsivity, issues with authority, difficulty with problem-solving, negative emotionality (anger), poor sexual self-regulation and using sex to cope, deviant sexual arousal, and poor cooperation with supervision." Ex. 4, p. 34. He "continues to show a lack of integration" of the material in sex offender treatment. Ex. 4, p. 34.
- Green has an extensive criminal history apart from his sexual offenses. See, e.g., Ex. 4, pp. 8-9.

While the Commonwealth recognizes the considerable interest involved in continued confinement, overriding interests of public safety and the petitioner's risk of flight, combined with the meritorious issue presented by the Commonwealth on appeal, compel the Commonwealth to seek a stay of the discharge order until its appeal is resolved. To do otherwise would deprive the Commonwealth of any means of insuring that it could regain Green's custody

should it succeed on appeal. The Court should not deprive the Commonwealth of the practical ability to seek compliance with a favorable appellate decision.

CONCLUSION

For these reasons, the Commonwealth requests, pursuant to Mass. R. App. P. 6(a), that this Court stay Green's discharge pending the resolution of the Commonwealth's appeal.

Respectfully Submitted

By the Commonwealth,

NANCY ANKERS WHITE
Special Assistant Attorney General

by: Mary P. Murray

Mary P. Murray, Counsel
Department of Correction
Massachusetts Treatment Center
30 Administration Road
Bridgewater, Massachusetts 02324
(508) 279-8184
BBO Number 555215
e-mail: Mary.Murray@massmail.state.ma.us

Dated: April 6, 2015

CERTIFICATE OF SERVICE

I hereby certify that I did this day serve a photocopy of the above document upon the petitioner to his counsel by e-mail (without attachments) and by first class mail, postage pre-paid (with attachments):

Sondra Schmidt, Esquire
726 Jerusalem Road
Cohasset, MA 02025

Michael Nam-Krane, Esquire
P.O. Box ~~636003~~ 301218
Boston, MA 02130

Mary P. Murray

Dated: April 6, 2015

Commonwealth of Massachusetts
SUPERIOR COURT
Case Summary
Civil Docket

Green v Commonwealth of Massachusetts

Details for Docket: PLCV2011-00918

Case Information

Docket Number:	PLCV2011-00918	**Caption:**	Green v Commonwealth of Massachusetts
Filing Date:	08/08/2011	**Case Status:**	Suspended transfered to Unified Sess
Status Date:	08/08/2011	**Session:**	Civil B - 3rd Floor (Plymouth)
Lead Case:	NA	**Case Type:**	Standard

Tracking Deadlines

TRK:	X	**Discovery:**	
Service Date:	11/06/2011	**Disposition:**	08/02/2012
Rule 15:		**Rule 12/19/20:**	
Final PTC:		**Rule 56:**	
Answer Date:		**Jury Trial:**	YES

Case Information

Docket Number:	PLCV2011-00918	**Caption:**	Green v Commonwealth of Massachusetts
Filing Date:	08/08/2011	**Case Status:**	Suspended transfered to Unified Sess
Status Date:	08/08/2011	**Session:**	Civil B - 3rd Floor (Plymouth)
Lead Case:	NA	**Case Type:**	SDP petition (123A sec 9)

Tracking Deadlines

TRK:	X	**Discovery:**	
Service Date:	11/06/2011	**Disposition:**	08/02/2012
Rule 15:		**Rule 12/19/20:**	
Final PTC:		**Rule 56:**	
Answer Date:		**Jury Trial:**	YES

Parties Involved

2 Parties Involved in Docket: PLCV2011-00918

EXHIBIT 1

Party Involved:		**Role:**	Defendant
Last Name:	Commonwealth of Massachusetts	**First Name:**	
Address:		**Address:**	
City:		**State:**	
Zip Code:		**Zip Ext:**	
Telephone:			

Party Involved:		**Role:**	Plaintiff
Last Name:	Green	**First Name:**	James
Address:	Mass. Treatment Center	**Address:**	30 Administration Rd.
City:	Bridgewater	**State:**	MA
Zip Code:	02324	**Zip Ext:**	
Telephone:			

Attorneys Involved

1 Attorneys Involved for Docket: PLCV2011-00918

Attorney Involved:		**Firm Name:**	FLAV01
Last Name:	Farrington	**First Name:**	Michael F
Address:	PO Box 1098	**Address:**	
City:	Mattapoisett	**State:**	MA
Zip Code:	02739	**Zip Ext:**	
Telephone:	508-360-7377	**Tel Ext:**	
Fascimile:	508-758-9502	**Representing:**	Green, James (Plaintiff)

Calendar Events

No Calendar Events found for Docket: PLCV2011-00918.

There are currently no calendar events associated with this case.

Full Docket Entries

5 Docket Entries for Docket: PLCV2011-00918

Entry Date:	Paper No:	Docket Entry:

08/08/2011	2	SDP petition (M G L. c. 123A, Sec. 9) filed
08/08/2011		Origin 1, Type E14, Track X.
08/08/2011	1	Affidavit of Indigency
08/08/2011	3	TRANSFERRED to Unified Session Suffolk Superior Court Criminal
08/08/2011	3	Division. Certified copies mailed 8/8/11

Commonwealth of Massachusetts
SUFFOLK SUPERIOR COURT
Case Summary
Criminal Docket

IN RE: Green, James

Details for Docket: SUCR2011-10838

Case Information

Docket Number:	SUCR2011-10838	**Caption:**	IN RE: Green, James
Entry Date:	08/11/2011	**Case Status:**	Criminal 8 Ctrm 914
Status Date:	03/23/2015	**Session:**	Disposed (post sentence activity)
Lead Case:	NA	**Deadline Status:**	
Trial Deadline:		**Jury Trial:**	NO

Parties Involved

3 Parties Involved in Docket: SUCR2011-10838

Party Involved:		**Role:**	Active
Last Name:	Green	**First Name:**	James
Address:	Massachusetts Treatment Center	**Address:**	30 Administration Road
City:	Bridgewater	**State:**	MA
Zip Code:	02324	**Zip Ext:**	
Telephone:			

Party Involved:		**Role:**	Complainant
Last Name:	Mass	**First Name:**	Comm of
Address:		**Address:**	
City:		**State:**	
Zip Code:		**Zip Ext:**	
Telephone:			

EXHIBIT 2

Party Involved:		**Role:**	Petitioner
Last Name:	Green	**First Name:**	James
Address:	Massachusetts Treatment Center	**Address:**	30 Administration Road
City:	Bridgewater	**State:**	MA

Zip Code:	02324	**Zip Ext:**	
Telephone:			

Attorneys Involved

3 Attorneys Involved for Docket: SUCR2011-10838

Attorney Involved:		**Firm Name:**	
Last Name:	Schmidt	**First Name:**	Sondra H
Address:	726 Jerusalem Road	**Address:**	
City:	Cohasset	**State:**	MA
Zip Code:	02025	**Zip Ext:**	0174
Telephone:	781-383-1245	**Tel Ext:**	
Fascimile:	781-383-8765	**Representing:**	Green, James (Petitioner)

Attorney Involved:		**Firm Name:**	MA143
Last Name:	Coyne	**First Name:**	Sabine M.
Address:	30 Administration Road	**Address:**	
City:	Bridgewater	**State:**	MA
Zip Code:	02324	**Zip Ext:**	
Telephone:	508-279-8100	**Tel Ext:**	
Fascimile:	508-279-8181	**Representing:**	Mass, Comm of (Complainant)

Attorney Involved:		**Firm Name:**	MA14
Last Name:	Murray	**First Name:**	Mary P
Address:	30 Administration Road	**Address:**	Legal Department
City:	Bridgewater	**State:**	MA
Zip Code:	02324	**Zip Ext:**	
Telephone:	508-279-8184	**Tel Ext:**	
Fascimile:	508-279-8181	**Representing:**	Mass, Comm of (Complainant)

Calendar Events

11 Calendar Events for Docket: SUCR2011-10838

No.	Event Date:	Event Time:	Calendar Event:	SES:	Event Status:
1	03/09/2015	09:00	TRIAL: S.D.P.	8	Event rescheduled by court order
2	03/10/2015	09:00	Hearing: Motion(s) in Limine	8	Event held as scheduled

3	03/11/2015	09:00	TRIAL: S.D.P.	8	Trial begins
4	03/12/2015	09:00	TRIAL: S.D.P.	8	Event continues over multiple days
5	03/13/2015	09:00	TRIAL: S.D.P.	8	Event continues over multiple days
6	03/16/2015	09:00	TRIAL: S.D.P.	8	Event continues over multiple days
7	03/17/2015	09:00	TRIAL: S.D.P.	8	Event continues over multiple days
8	03/18/2015	09:00	TRIAL: S.D.P.	8	Trial ends
9	03/23/2015	09:00	Hearing: Post-Sentence	8	Event held as scheduled
10	03/25/2015	09:00	Hearing: Post-Sentence	8	Event held as scheduled
11	04/03/2015	09:00	Hearing: Post-Sentence	8	Event held as scheduled

Full Docket Entries

171 Docket Entries for Docket: SUCR2011-10838

Entry Date:	Paper No:	Docket Entry:
08/11/2011	1	Petition for release & discharge received from Plymouth County
08/11/2011	1	Superior Court for hearing only per standing order of the Court
08/11/2011		Affidavit of Indigency and Request for waiver substition or state
08/11/2011		payment of fees and costs filed without Supplemental affidavit
11/15/2011		Appointment of Counsel Sondra H Schmidt, pursuant to Rule 53
05/30/2014	2	Commonwealth files Jury demand
08/28/2014	3	Discovery Order, filed MacLeod, J
08/28/2014	4	Scheduling Order, filed MacLeod, J
11/17/2014	5	Petitioner files Ex Parte Motion for funds for two expert witnesses
11/17/2014	5	and for access to Petitioner's unredacted records for counsel and his
11/17/2014	5	experts
11/18/2014		MOTION (P#5) allowed in the amount not to exceed $4000.00 per
11/18/2014		examiner. Access to unredacted records is allowed. (Garry V. Inge,
11/18/2014		Justice)
02/25/2015	6	Commonwealth files Proposed witness list
02/25/2015	7	Commonwealth files Notice of intent to present expert witnesses
03/03/2015	8	Commonwealth files Motion in limine to exclude results of PPG and
03/03/2015	8	"adjunct psychological testing or in the alternative for supplemental
03/03/2015	8	discovery in anticipation of a daubert/lanigan hearing on
03/03/2015	8	admissibility
03/04/2015	9	Commonwealth files Proposed statement of the case
03/04/2015	10	Commonwealth files Motion for voir dire
03/04/2015	11	Commonwealth files Motion in limine to exclude certain evidence
03/04/2015	11	concerning the adeqaucy of the Petitioner's treatment and/or
03/04/2015	11	conditions of his confinement
03/04/2015	12	Commonwealth files Motion in limine to exclude jury instruction on
03/04/2015	12	presumption of not being sexually dangerous

03/04/2015	13	Commonwealth files Motion in limine to exclude from evidence
03/04/2015	13	references to published material and recidivism statisitcs
03/04/2015	14	Commonwealth files Motion in limine regarding expert testimony from
03/04/2015	14	psychologist members of the Community Access Board
03/04/2015	15	Commonwealth files Proposed jury instructions
03/04/2015	16	Supplemental motion in limine to exclude results of the abel
03/04/2015	16	assessment sexual interest
03/05/2015	17	Petitioner files Opposition to Commonwealth's motion to exclude
03/05/2015	17	results of PPG
03/05/2015	18	Petitioner files List of potential witnesses
03/05/2015	19	Petitioner files Suggested revisions to Commonwealth's proposed
03/05/2015	19	statement of the case
03/05/2015	20	Petitioner files Motion in limine to exclude reference to deviant
03/05/2015	20	arousal from testimony exhibits and arguments
03/05/2015	21	Petitioner files Motion in limine to exclude charges/allegation not
03/05/2015	21	resulting in conviction
03/05/2015	22	Petitioner files Motion regarding admissibility of passages in
03/05/2015	22	professional journals books and research articles with regard to
03/05/2015	22	recidivism statisitcs
03/05/2015	23	Petitioner files Motion in limine to exclude docket entries and other
03/05/2015	23	extraneous and/or prejudicial conviction documents
03/05/2015	24	Petitioner files Motionn in limine to exclude certain questions
03/05/2015	24	regarding the reports and testimony if independent experts
03/05/2015	25	Petitioner files Motion in limine to exclude reference to stable 2007
03/05/2015	26	Petitioner files Opposition to commonwealth's motion in limine to
03/05/2015	26	exclude from evidence references to published material and recidivism
03/05/2015	26	statisitics
03/05/2015	27	Petitioner files Opposition to commonwealth's motion in limine to
03/05/2015	27	exclude from evidence references to published material and recidivism
03/05/2015	27	statisitics
03/05/2015	28	Petitioner files Opposition to commonwealth's motion in limine to
03/05/2015	28	exclude certain evidence concerning the adequacy of the Petitioner's
03/05/2015	28	treatment and/or conditions of his confinement
03/05/2015	29	Petitioner files Motion in limine to exclude all reference to
03/05/2015	29	Petitioner's right to file present or subsequent petitions and/or
03/05/2015	29	reference to prior section 9 hearings
03/05/2015	30	Petitioner files Motion in limine to exclude use of phrase, "Remains
03/05/2015	30	Sexually Dangerous"
03/05/2015	31	Petitioner files Motion for jury instruction Re: Presumption of not
03/05/2015	31	sexually dangerous
03/05/2015	32	Petitioner files Request for additional language in the Court's
03/05/2015	32	charge to the jury with regard to past sexual misconduct in the
03/05/2015		

	32	"likely" sextion of the charge
03/05/2015	33	Petitioner files Request for special jury instruction
03/05/2015	34	Petitioner files Proposed jury instructions
03/05/2015	35	Petitioner files Request to exclude language from charge regarding
03/05/2015	35	more likely than not
03/05/2015	36	Petitioner files Request for special jury instruction prior to
03/05/2015	36	Community Access Board representative's testimony
03/05/2015	37	Petitioner files Proposed balancing additional jury instructions
03/05/2015	38	Petitioner files Request for additional jury instruction regarding
03/05/2015	38	Community Transition Program
03/05/2015	39	Petitioner files Motion to exclude non-convictions mention of
03/05/2015	39	previous qualified examiners section 9 proceedings and other objected
03/05/2015	39	to testimony/passages as noted in appended copies of reports
03/09/2015	40	Commonwealth files Opposition to Petitioner's motion in limine to
03/09/2015	40	exclude certain questions regarding the reports and testimony of
03/09/2015	40	Petitioner's experts
03/09/2015	41	Commonwealth files Request to submit reply memo in support of motion
03/09/2015	41	to exclude PPG and reply memo
03/10/2015		Petitioner brought into court. Hearing Re: Motions
03/10/2015		After hearing MOTION (P#30) denied (Laurence D. Pierce, Justice)
03/10/2015		MOTION (P#29) allowed without opposition (Laurence D. Pierce, Justice)
03/10/2015		MOTION (P#11) allowed (Laurence D. Pierce, Justice)
03/10/2015		MOTION (P#13) denied (Laurence D. Pierce, Justice)
03/10/2015		MOTION (P#26) denied (Laurence D. Pierce, Justice)
03/10/2015		MOTION (P#27) denied (Laurence D. Pierce, Justice)
03/10/2015		MOTION (P#24) allowed in part and denied in part (See Record)
03/10/2015		(Laurence D. Pierce, Justice).
03/10/2015		MOTION (P#20) denied (Laurence D. Pierce, Justice)
03/10/2015		MOTION (P#23) No action taken at this time. Pierce, J
03/10/2015		MOTION (P#21) No action taken at this time. Pierce, J
03/10/2015		MOTION (P#39) No action taken at this time. Pierce, J
03/10/2015		MOTION (P#16) Moot. Pierce, J
03/10/2015		MOTION (P#8) allowed (Laurence D. Pierce, Justice)
03/10/2015		Case continued to 3/11/15 for impanelment. Pierce, J., S. Coyne,
03/10/2015		AAG., S. Schmidt, Atty., W. Greenlaw, Court Reporter
03/11/2015		Petitioner brought into court
03/11/2015		The Court order Fourteen (14) jurors impaneled. Twelve (12) jurors
03/11/2015		impaneled.Pierce, J., S. Coyne, AAG., S. Schmidt, Atty., W. Greenlaw,
03/11/2015		Court Reporter
03/11/2015	42	Petitioner files Motion
03/12/2015		Petitioner brought into court
03/12/2015		Impanelement continues. Juror in seat #8 E. H. dismissed.
03/12/2015		

		After hearing MOTION (P#42) allowed (Laurence D. Pierce, Justice)
03/12/2015		Hearing Re: Motion Paper #42.
03/12/2015		Jurors sworn. Trial with Thirteen (13) jurors present begins before
03/12/2015		Pierce, J., S. Coyne, AAG., S. Schmidt, Atty., W. Greenlaw, Court
03/12/2015		Reporter
03/13/2015		Petitioner brought into court
03/13/2015		Trial with Thirteen (13) jurors present continues before Pierce, J
03/13/2015		Commonwealth rests
03/13/2015	43	Petitioner's Motion for a directed verdict filed and denied after
03/13/2015	43	hearing. Pierce, J., S. Coyne, AAG., S. Schmidt, Atty., JAVS (ERD)
03/16/2015	44	Petitioner files Ex Parte Motion for additional funds to compensate
03/16/2015	44	Dr. Joseph J. Plaud, Ph.D
03/16/2015		Petitioner brought into court
03/16/2015		Trial with Thirteen (13) jurors present continues before Pierce, J
03/16/2015		Petitioner rests
03/16/2015		Petitioner's Renewed Oral Motion for a directed verdict made and
03/16/2015		denied after hearing. Pierce, J
03/16/2015		Charge conference held
03/16/2015		MOTION (P#12) denied (Laurence D. Pierce, Justice)
03/16/2015		MOTION (P#14) denied (Laurence D. Pierce, Justice)
03/16/2015		MOTION (P#37) denied Pierce, J., S. Coyne, AAG., S. Schmidt, Atty.,
03/16/2015		W. Greenlaw, Court Reporter
03/17/2015		Petitioner brought into court
03/17/2015		Trial with Thirteen (13) jurors present continues before Pierce, J
03/17/2015		At the final submission of the case to the jury the Court appoints
03/17/2015		Juror #169 B.R. in seat #1 as foreperson of the jury
03/17/2015		After in spection both parties are satisified with the exhibits and
03/17/2015		verdict slip
03/17/2015		Deliberations begin with Thirteen (13) jurors present
03/17/2015		Jurors allowed to seperate and reconvene on Wednesday 3/18/15 for
03/17/2015		further deliberations. Pierce, J., S. Coyne, AAG., S. Schmidt, Atty.,
03/17/2015		W. Greenlaw, Court Reporter
03/18/2015		Petitioner brought into court
03/18/2015		Deliberations continue with Thirteen (13) jurors present
03/18/2015		Question from jury marked "L" for ID
03/18/2015		SDP: Verdict returned Petitioner no longer a sexually dangereous
03/18/2015		person
03/18/2015	45	Verdict affirmed, verdict slip filed. Commonwealth's oral motion for
03/18/2015	45	stay allowed until Monday 3/23/15 for further hearing. MacLeod, J.,
03/18/2015	45	S. Coyne, AAG., S. Schmidt, Atty., W. Greenlaw, Court Reporter
03/23/2015	46	Commonwealth files Motion for a new trial or in the alternative for
03/23/2015	46	stay of discharge order pending appeal
03/23/2015		

	47	Petitioner files Oppostion to Commonwealth's motion for a new trial
03/23/2015	47	or in the alternative a discharge order pending appeal
03/23/2015		Petitioner brought into court. Hearing Re: Motion Paper #46
03/23/2015		After hearing Motion Paper #46 Motion for new trial denied and motion
03/23/2015		to stay continued to 3/25/15 at 9:00. Pierce, J., S. Coyne, AAG., S.
03/23/2015		Schmidt, Atty., W.Greenlaw, Court Reporter
03/25/2015	48	Commonwealth files Supplemental memorandum in support of Motion for
03/25/2015	48	a new trial or in the alternative for stay of discharge order pending
03/25/2015	48	appeal
03/25/2015	49	Petitioner files Production of documentation requested by pertaining
03/25/2015	49	to Petitioner's release
03/25/2015		Petitioner brought into court. Status hearing held before Pierce, J
03/25/2015		Re: Discharge status. Discharge is stayed until further hearing is
03/25/2015		determined. Pierce, J ., S. Coyne, AAG., S. Schmidt, Atty.,
03/25/2015		W.Greenlaw, Court Reporter
03/31/2015	50	Appearance of Commonwealth's Atty: Mary Murray
03/31/2015	51	Commonwealth files Response to Petitioner's further production of
03/31/2015	51	documentation

Charges

No Charges found for Docket: SUCR2011-10838.

There are currently no charges associated with this case.

COMMONWEALTH OF MASSACHUSETTS

UNIFIED SESSION AT SUFFOLK **SUPERIOR COURT**
SUCR2011-10838

JAMES GREEN

vs.

COMMONWEALTH OF MASSACHUSETTS

ORDER ON COMMONWEALTH'S MOTION FOR A NEW TRIAL OR, IN THE ALTERNATIVE, FOR A STAY OF DISCHARGE ORDER PENDING APPEAL

The matter is before the court on the Commonwealth's Motion for a New Trial or, in the Alternative, for a Stay of Discharge Order Pending Appeal. As set forth below, the motion for a new trial was previously DENIED on March 23, 2015. After a hearing this date, the Petitioner is ordered released on April 8, 2015.

PROCEDURAL BACKGROUND

A jury trial of the above-captioned G. L. c. 123A, § 9 case began on March 12, 2015. The trial continued on March 13 and March 16. On March 17, counsel for the Petitioner and the Commonwealth made closing arguments to the jury, after which the court gave its final instructions.

The court's instructions included the following:

> In order to find that Mr. Green is a sexually dangerous person, you must credit the opinion of Dr. Nancy Connolly who testified in her capacity as a Qualified Examiner and opined that Mr. Green is a sexually dangerous person as defined in the law at the present time. It is not required that you accept all of the reasons given by Dr. Connolly for her opinion; you may find support for the opinion anywhere in the evidence, including in

EXHIBIT 3

> the testimony of Dr. Angela Johnson, the [Community Access Board or "CAB"] representative. However, you cannot find that Mr. Green is a sexually dangerous person today unless you credit the opinion of Dr. Connolly that Mr. Green suffers from a mental condition that causes him serious difficulty in controlling his sexual impulses at the present time.

(Referred to herein as the "CAB limiting instruction.")

The jury's deliberations began at approximately 11:00 AM on March 17, 2015. At 4:10 PM, the jury was excused for the evening without reaching a verdict. Before excusing the jury, the trial court judge explained to the jury that he[1] would not be present in court the next day, that a second Superior Court judge would be standing in, but that the trial court judge would be available by telephone, if necessary.[2]

On March 18, 2015, jury deliberations resumed at 9:35 AM. At approximately 10:10 AM, the jury submitted a question, not related to the pending motion.[3] At approximately 10:45 AM, a second Superior Court judge conferred with counsel and responded to the jury's question, in writing.[4]

Thereafter, the Commonwealth became aware that the Massachusetts Appeals Court had issued its opinion in the case of George Souza v. Commonwealth, (No. 13-p-1052). In Souza, a divided court found that the trial

[1] Referred to herein as the "trial court judge."

[2] These arrangements were discussed with the parties prior to being announced to the jury. Neither party objected to the arrangements, including the involvement of a second Superior Court judge.

[3] "Question: Are there ever any circumstances under which the Commonwealth does not oppose the release of a petitioner who has previously been deemed a sexually dangerous person?"

[4] The court wrote to the jury, "Mr. Foreman and members of the jury: such circumstances or considerations ought not to be part of deliberations and cannot form the basis of your verdict."

judge erred in allowing the petitioner's motion for a directed verdict. The majority opinion also addressed the Commonwealth's argument that the trial court erred in instructing the jury with regard to the extent it was to rely on the testimony of the Commonwealth's qualified examiner, as compared to the testimony of a representative of the CAB.[5] The Appeals Court concluded that this instruction is "not compelled" by Johnstone, petitioner, 453 Mass. 544, 553 (2009) "and that it is otherwise inadvisable."

Upon learning of the Souza decision, the Commonwealth made an oral request that the trial court reinstruct the deliberating jury, without the CAB limiting instruction. At 11:35 AM on March 18, 2015, the trial court judge conducted a hearing, via telephone, regarding the Commonwealth's request. After hearing from the parties and reviewing the Souza decision, the court denied the request that the jury be reinstructed.

The court's reasons for denying the motion were as follows: First, the Petitioner's case had been tried with the understanding that the CAB limiting instruction would be given. The court discussed with the parties before the presentation of evidence that while there had been other cases where the court had not given the limiting instruction, the court had been convinced that in this case it was appropriate. Second, by the time the Souza decision became known to the parties and the court, the jury in the Petitioner's case had been deliberating for over seven hours. Reinstructing the jury would have required the jury to begin its deliberations anew. Finally, the court believed that reinstructing the jury by omitting one paragraph from its original instructions had the potential

[5] Specifically, the judge had instructed the jury that: "You heard the testimony of Dr. Tomich, a representative of the community access board. The law permits a representative of the community access board to testify in all proceedings like this one, and you may certainly rely upon the testimony of Dr Tomich. However, you cannot find that the petitioner, Mr. Souza, is sexually dangerous based solely on the testimony of Dr. Tomich. In order for you to find that Mr. Souza is today a sexually dangerous person, you must find support for that determination in the opinion that [sic] Dr. Kelso, who testified as a qualified examiner."

for confusing the jury and distracting it from a fair consideration of all the evidence.

Shortly after 2:15 PM, on March 18, 2015, the jury returned a verdict finding that the Commonwealth had not sustained its burden of proving, beyond a reasonable doubt, that the Petitioner was presently a sexually dangerous person.

Following the jury verdict, the Commonwealth made an oral request to stay the Petitioner's discharge to allow time for the Commonwealth to seek appellate review. No action was taken on that request on March 18, 2015, and the matter was scheduled for a hearing on March 23. On March 23, the Commonwealth filed a written motion seeking a new trial or in the alternative a stay of the Petitioner's discharge "until March 30, 2015 to permit the Commonwealth to seek a stay from the appellate courts." The Petitioner filed a written opposition to the Commonwealth's motion, including a request that the Petitioner be discharged from the Massachusetts Treatment Center (the "Treatment Center").

On March 23, 2015, the trial court judge conducted a hearing on the Commonwealth's motion. After reviewing the pleadings and hearing from the parties, the court denied the request for a new trial.

In denying the motion for a new trial the court considered "whether the original instructions were erroneous as a matter of law, and, if so, whether the result in the first trial might have been different absent the error." Kassis v. Lease & Rental Mgmt. Corp., 79 Mass. App. Ct. 784, 788 (2011). A motion for new trial may only be granted if the error gives rise to a substantial risk of a miscarriage of justice. Wojcicki v. Caragher, 447 Mass. 200, 216 (2006); Commonwealth v. Russell, 439 Mass. 340, 345 (2003). A substantial risk of a miscarriage of justice exists when the court has "a serious doubt whether the result of the trial might have been different had the error not been made." Russell, 439 Mass. at 345, quoting Commonwealth v. Randolph, 438 Mass. 290, 298 (2002). Here, assuming that the limiting instruction was erroneous, the court concluded that it was unlikely to have affected the jury's verdict. The Petitioner had served substantial

prison sentences after criminal convictions and had been confined to the Treatment Center for approximately four years. The qualified examiner who testified for the Commonwealth was effectively cross-examined regarding her opinion that the Petitioner remained sexually dangerous and the Petitioner's expert witness testified plausibly that he had effectively undertaken treatment at the Treatment Center and that he was no longer sexually dangerous.

After denying the motion for a new trial, the court continued the matter to March 25, 2015, for a further hearing on the Commonwealth's request for a stay. The court advised the parties that it was inclined to deny the Commonwealth's request to continue holding the Petitioner at the Treatment Center and to release him under the supervision of the Probation Department, with GPS monitoring and other conditions, including that he reside at the New England Center for Homeless Veterans, 17 Court Street, Boston, and that he not consume alcohol or non-prescription drugs.[6] The Commonwealth advised the court orally that it intended to seek appellate review of both the court's refusal to re-instruct the jury without the CAB limiting instruction and the court's denial of the Commonwealth's motion for a new trial.

On March 25, 2015, the parties reported to the court that the Probation Department at Suffolk Superior Court had requested additional time to consider its position regarding supervision of the Petitioner, pending appeal. Thereafter, the case was scheduled for a hearing on April 3, 2015.

On April 2, 2015, General Counsel for the Commissioner of Probation filed with the court Probation's Written Statement Upon Request of the Court ("Probation's Statement"), which concludes that the Probation Department lacks jurisdiction to supervise post-dispositional probation except where an individual is before the court in criminal or juvenile sessions charged with an "offense or

[6] The court advised the parties that it was informed in this regard by the trial court in Souza, where after directing a verdict in favor of the petitioner, the court ordered Mr. Souza released under the supervision of probation, with GPS monitoring and other conditions.

crime," or "adjudicated a delinquent." G. L. c. 276, §§ 87, 87A and G. L. c. 119, § 58.[7]

After a further hearing on April 3, 2015, and having reviewed the Probation Department's submission, the court concludes that it does not have authority to release the Petitioner, with conditions supervised by probation. Chapter 123A, § 9 is clear, "Unless the trier of fact finds that such person remains a sexually dangerous person, it shall order such person to be discharged from the treatment center." Here, a jury has concluded that the Commonwealth failed to sustain its burden of establishing that the Petitioner is a sexually dangerous person, beyond a reasonable doubt.

Accordingly, the court orders that the Petitioner be discharged from the Treatment Center. The effective date of the discharge is April 8, 2015. The delayed discharge is intended to give the Commonwealth an opportunity to seek appellate review.

So Ordered.

Laurence D. Pierce,
Justice of the Superior Court

DATE: April 3, 2015

[7] Probation explains in its submission that it agreed to supervise Mr. Souza erroneously, and that they intend to seek reconsideration of the court's order of probation supervision, in that case.

FHS FORENSIC HEALTH SERVICES, INC
A wholly owned subsidiary of MHM Services

REPORT OF A QUALIFIED EXAMINER TO THE COURT*

NAME: James Green, M-106022
DATE OF BIRTH: (56 years old)
DATE OF REPORT: 1/11/2015
DATE OF INTERVIEW: 12/18/2014

IDENTIFYING INFORMATION: Mr. James Green is a 56 year old male who was first arrested for a sexual offense in 1986 when he was charged with Rape, Indecent Assault and Battery, and Assault and Battery. Initially he was convicted of Rape and sentenced for this offense, however, the verdict was overturned in 1997 after he served a portion of his sentence (less than 1 year). The case was not prosecuted after that. In 1991, Mr. Green was charged again with Rape, Indecent Assault and Battery, Kidnapping, and Possession of a controlled substance but convicted on just the Indecent Assault and Battery charge with the other charges either filed or dismissed. Mr. Green was arrested in 1997 for charges of Rape, Assault to Rape, and Assault and Battery. He was convicted for the two sexual offenses; the Assault and Battery charge was filed. Mr. Green was arraigned in 2002 for Rape, Assault and Battery and Habitual Offender. In 2006, he was found guilty of the Rape and Assault and Battery charges and the Habitual Offender charge was dismissed. In addition to the sexual offenses stated above, Mr. Green has multiple arrests and convictions for non-sexual offenses and has served criminal sentences for both the non-sexual offenses and the sexual offenses. Mr. Green is listed as a Level III Sex Offender with the Sex Offender Registry Board. In November 2003, a warrant was issued for Failure to Register as a Sex Offender.

Mr. Green participated in sex offender treatment prior to the 2002 offense. He then participated in the Sex Offender Treatment Program at the Massachusetts Treatment Center for state inmates beginning in October 2007. He was temporarily committed for evaluation of his sexual dangerousness in January 2010 and he was civilly committed at the Massachusetts Treatment Center as a Sexually Dangerous Person on July 19, 2011.

EXHIBIT 4

*This evaluation has been written for the purpose of assisting the Court in its determination of whether or not this individual meets the Commonwealth's criteria for being considered a Sexually Dangerous Person as those criteria are outlined in M.G.L. 123A.

It has not been written for the purpose of sex offender registration, classification and/or community notification.

110 Turnpike Road, Suite 308 I Westborough, MA 01581 I P: 508.285.4018 I F: 508.285.0820

LEGAL CRITERIA FOR DETERMINING WHETHER A PERSON IS A SEXUALLY DANGEROUS PERSON:

Massachusetts General Laws, Chapter 123A, Section 1 defines a "Sexually Dangerous Person" as "any person who (i) has been convicted of or adjudicated delinquent of or youthful offender by reason of a sexual offense and suffers from a mental abnormality or personality disorder which makes the person likely to engage in sexual offenses if not confined to a secure facility (ii) has been charged with a sexual offense and was determined to be incompetent to stand trial and who suffers from a mental abnormality or personality disorder which makes such person likely to engage in sexual offenses if not confined to a secure facility; or (iii) a person previously adjudicated as such by a court of the commonwealth and whose misconduct in sexual matters indicates a general lack of power to control his sexual impulses, as evidenced by repetitive or compulsive sexual misconduct by either sexual violence against any victim, or aggression against any victim under the age of 16 years, and who, as a result, is likely to attack or otherwise inflict injury on such victims because of his uncontrolled, or uncontrollable desires."

The Law defines the term "Mental Abnormality" as a "congenital or acquired condition of a person that affects the emotional/volitional capacity of the person in a manner that predisposes that person to the commission of criminal sexual acts to a degree that makes that person a menace to the health and safety of other persons."

A "Personality Disorder" is defined by Law as a "congenital or acquired physical or mental condition that results in a general lack of power to control sexual impulses."

WARNING ON THE LIMITS OF CONFIDENTIALITY:

Prior to beginning my interview with Mr. Green, I informed him that I was a Qualified Examiner appointed by the Commonwealth of Massachusetts to conduct an evaluation regarding whether or not he met the legal criteria of a Sexually Dangerous Person. I told him that after I conducted an interview with him, I would be offering an opinion to the Court about his sexual dangerousness and that I would be gathering information that the Court could use to make this determination at his upcoming hearing. I told Mr. Green that this was not a private or confidential interview and that I would be including information that he discussed with me in the report which would be submitted to the Court. I informed Mr. Green that he was not required to participate in the interview, that he could answer or not answer any specific questions, and that he could end the interview at any time. I also told Mr. Green that he could offer any information he thought would be relevant to his case, even if I did not specifically ask about it. Mr. Green appeared to understand the substance of the warning and when I asked him to paraphrase his understanding of this warning, he was able to accurately do so. Mr. Green appeared to fully understand the warning.

SOURCES OF INFORMATION:

1. Department of Correction files including Massachusetts Treatment Center medical records, treatment records, and disciplinary/observation of behavior reports.
2. Certified Copies of Criminal Convictions with Summary (not dated).
3. Grand Jury Minutes from Plymouth County dated 8/9/2002.
4. Plymouth Superior Court Case Summary and Criminal Docket 2002-2008.
5. Brockton Police Department reports including Arrest Report dated 5/31/2002 and Report Supplement.
6. Metropolitan District Police Report dated 4/3/1986.
7. Grand Jury Minutes from Suffolk County dated 6/12/1997.
8. Court documents from Suffolk County including a statement of facts (undated).
9. Suffolk Superior Court Case Summary and Criminal Docket 1997-1998.
10. Boston Police Department Sexual Assault Unit report dated 5/28/1997, and Incident Report dated 5/27/97.
11. Worcester Superior Court Case Summary and Criminal Docket dated 1991-2004.
12. Worcester Police Department Supplemental Report dated 2/21/1991.
13. Superior Court Probation Office Court record from 1983-1991.
14. Probation Offender Profile dated 5/10/1991.
15. Criminal History Systems Board Report dated 3/21/2007.
16. Letter from Cutler Alcohol and Substance Abuse Program dated 9/1/1987.
17. Forensic Health Services Intake Assessment dated 12/4/2007 with two addendums.
18. Community Access Board Annual Reviews dated 7/24/2012 and 8/1/2013.
19. Report of a Qualified Examiner written by Michael J. Murphy, Ed.D. dated 5/14/2010 and Updated Report dated 1/14/2011.
20. Report of a Qualified Examiner written by Carol G Feldman, Ph.D., J.D. dated 5/17/2010 and updated report dated 1/13/2011.
21. Application for Placement in the Therapeutic Community dated 11/23/2011 and Response Form dated 9/19/2012.
22. Community Access Board Review Forms dated 8/2/12 and 9/6/2013.
23. Therapeutic Community: Initial Treatment Plan dated 10/9/2012.
24. Comprehensive Evaluation dated 3/14/2012 and Addendum dated 5/29/2012.
25. Contact notes dated 5/3/2012, 6/26/12, 7/9/2012, 7/30/2012, 3/7/2014, and 10/1/2014.
26. Statewide Sex Offender Treatment Program Tracking Sheet (not dated).
27. Forensic Health Services Psychoeducational Classes Tracking Sheet (not dated) and Class Log dated 7/12/2013.
28. Individual Behavioral Plans dated 7/9/2012 and 3/7/2014.
29. Massachusetts Treatment Center Group Progress Notes including notes from 11/3/2009-9/30/14.

30. Psycho-educational Class Participant Evaluations including evaluations from 11/26/2007-2/12/2014.
31. Forensic Health Services Annual Treatment Reviews including those dated 7/9/2012 and 7/10/2014.
32. Treatment Review Panel Six-Month reviews dated 1/26/2102, 1/14/2013, and 1/23/2014.
33. Treatment Review Panel for Determination of Status dated 5/1/2012 and Treatment Review Panel Response Form dated 5/8/2012.
34. Letter from Mr. Green requested a PPG dated 9/11/2013.

RELEVANT HISTORY: When I interviewed Mr. Green on 12/18/2014, we reviewed the psychosocial history in his Comprehensive Evaluation which was quoted from an Intake Assessment dated 12/4/2007. He agreed with most of the information in the Comprehensive Evaluation, however, he also provided clarification or updates.

From the 12/4/2007 Intake Assessment, the following information was provided:

> "Mr. Green reported he was born and raised in a low-middle income family in Waynesboro, Georgia by his paternal grandmother and grandfather until he was sixteen years old. He stated his parents were never married, because they were too young. His father was sixteen and his mother was fourteen when he was born. He indicated there are conflicting stories about how he was placed into his grandmother's custody at age three or four years old. His mother reported his father took him away from her and his father reported his mother gave Mr. Green up to his grandmother. Mr. Green stated he believes both parents and further expressed that it is "their problem they can't get it together. I'm okay." Both of his parents re-entered into relationships. His father married a woman named Barbara in Boston, Massachusetts, which produced a younger half-brother, who Mr. Green remains in contact with and reports having the closest relationship with. After this relationship ended, his father entered into a relationship with a woman named Ida, which produced who two half brothers..."

Mr. Green's father and grandmother are now both deceased. He has been estranged from his father's family for over 20 years after an incident where his stepmother did not want one of his young nieces sitting on his lap due to his history of sexual offenses. He does not know where his mother lives or if she is still alive because after his father died, he did not have any information about her whereabouts. He said his father "kept the phone numbers" and when he died, that information was lost to Mr. Green.

From the 12/4/2007 Intake Assessment:

> "Mr. Green described the environment he was raised in as easy going and laid back. He reported his grandmother was a hairdresser. He stated he also lived with his two aunts and two uncles who were about 5 to 10 years older. He reported they did not treat him

> very well. He indicated there were several verbal and a few physical altercations. He reported his grandmother treated him "as if he were her own child." He reported his father called one time per week to check on him. He stated his grandmother and father would describe him as a good child. Mr. Green reported he was typically punished three to four times per year by his grandmother, who used a belt or extension cord. He stated he got into trouble for school fights or not doing school work, but denied getting into trouble at home.
>
> Mr. Green moved to Massachusetts with his father when he was 16 years old. He reported his father requested he live with him because his grades were decreasing. He attended a private school and lived in Mattapan, Massachusetts with his father's family."

Mr. Green reported that he graduated from Cathedral High School in Boston. Records state that he was suspended on two occasions for fighting in high school. As stated in the Comprehensive Assessment dated 3/14/2012:

> "Mr. Green reported that he was involved in two fights growing up. He stated one fight was in fifth or sixth grade. He reported that another boy followed him home and his grandmother forced him to fight. The second fight he stated was when he was 17. He reported that a female, the same age or younger, threw a snowball at him. He responded by punching her in the stomach. Mr. Green stated that after he punched her he apologized."

Mr. Green stressed that the female he punched threw a snowball that hit him before he punched her.

Sexual History:

According to the Comprehensive Assessment, Mr. Green first had sexual intercourse when he was 15 or 16 years old. He began masturbating at age 13, 1 to 2 times per week. According to the evaluation:

> "As an adult, he masturbated at the same frequency except when he was 23-25 when he masturbated three times per week. He stated this increase was attributed to gaining access to pornographic movies, which 'made him sit up a little bit.' He stated his fantasies typically include oral and vaginal sex and with someone who he has had sex with in the past. He reported he first viewed pornographic magazines at age 13-14 and looked at them until 2002 when he came to prison. He stated he first viewed pornographic videos from ages 16 to 17, which is inconsistent with his explanation of why his masturbation increased at age twenty-three. He denied viewing pornography over the Internet. In general he stated he rarely viewed pornography as an adolescent or an adult. When he did view pornography it was typically of heterosexual sex."

When I spoke to Mr. Green about his use of pornography, he said that he became "preoccupied a little bit at Gardner" while he was incarcerated. He described the pornography as "a big part" of his life at that time.

The Comprehensive Assessment stated that Mr. Green used the services of prostitutes over 100 times. Mr. Green disputed that number when he spoke to me and stated he had used prostitutes "lower than 100 times." He said he used prostitutes when he was high on cocaine. He also described using drugs to pay prostitutes for sex.

Mr. Green told me that he had "around 50" casual sex partners when he was in the community, which he did not view as a high number but he said he has been told in treatment that he had "a lot" of sex partners.

The Comprehensive Assessment reported that Mr. Green said he had "peeped on people undressing or having sex without their knowledge". Mr. Green said that he misunderstood the question during the evaluation and that what he meant was that on one occasion he was living with his cousin and was locked out of the house. He said, "I was outside and heard them having sex... that's it." He denied a history of voyeurism.

Sexual Abuse History:

Mr. Green reported that he was sexually abused by an uncle and later, by an aunt. As stated in the Comprehensive Assessment, Mr. Green's uncle sexually abused him when he was five years old. Earlier reports state that his uncle did not perform oral sex on Mr. Green, however, Mr. Green revised this report and stated that, in fact, his uncle engaged in oral sex with Mr. Green on more than one occasion. Mr. Green stated that the abuse was confusing to him and he "learned about secrets." He recalled that the experience was sexually arousing to him at the time. Mr. Green reported that he "attempted to do the same thing" (oral sex) to his brother, when Mr. Green was 10 or 11 years old. ···as 4 or 5 years old at the time.

When Mr. Green was 9 or 10 years old, he reported that his aunt sexually abused him. As stated in previous reports, she was 15 or 16 years old "when she lay naked on a couch with her legs up. She was watching television and no one else was in the room. Mr. Green reported her behavior and lack of clothing indicated to him that she wanted to engage in sexual intercourse with him." Initially when speaking to me, Mr. Green stated that he "probably got on top of her," however, he then stated that he "sodomized her." He stated, "I don't remember anything after that. It was late at night and it never happened again."

Relationship History:

From the Comprehensive Assessment:

> "Mr. Green reported he started dating at age sixteen. He stated he would go with dates to the movies or visited her at her house. He reported being in three or four relationships with all of them being important to him. He stated his longest relationship

> was five years and his shortest was for six months. The first relationship was with a woman named Betty when he was 16-17 to 25 years old. He reported they broke up due to him moving to Boston and carrying [on] a long distance relationship did not work out. After he moved to Boston and while dating Betty, he met a woman named Wanda and dated from ages 17-20 when they broke up because he entered the military. After the military, he engaged in a relationship with a woman named Sheila who he dated for four years. At the same time as Sheila, he dated a woman named Marilyn. He did not report any other relationships after the age of 26. He stated he lived with a partner consistently for three years. In general, he stated that his relationships ended due to both of them cheating, fights, trust issues, and falling in love with someone else..."

Mr. Green has never been married. He has a daughter from a relationship with a woman named Mary, who he described seeing "a couple of times" when she became pregnant. They did not continue their relationship after that.

Military History: Mr. Green reported that he served for two years in the military beginning in 1979. He said he received a General Discharge under Honorable Conditions. His military career ended because he asked his commander to "transfer or remove" him from his post. He was having difficulty with an officer whom he described as "racist." Mr. Green was scheduled to serve for four years but due to this issue, he was discharged prematurely.

Employment History:

The Comprehensive Assessment reported that Mr. Green's work history began when he was 13 years old. Mr. Green reported having many jobs and he worked for many years for his father, who owned gas stations. Mr. Green described himself as "a good worker." When he was in the community, Mr. Green's drug use interfered with his employment and contributed to his financial difficulties.

Substance Abuse History:

The Comprehensive Assessment reported that Mr. Green first used cocaine at age 27 and that he used approximately a half a gram per week. His last use was in 2002 prior to his most recent incarceration. The report stated that Mr. Green began drinking wine at age 13 and beer at age 16. Mr. Green stated that he did not typically drink a quart of beer per day, as stated in the evaluation, rather, he drank a quart of beer per day when he was relapsing. He acknowledged smoking marijuana and using cocaine. As stated in the evaluation, Mr. Green supported his cocaine habit by working at a job, by engaging in breaking and entering and stealing, and by panhandling. He was in detox programs three times.

Records show that Mr. Green attended Substance Abuse Treatment in the community in 1987. There is a letter from the Cutler Alcohol and Substance Abuse Program dated 9/1/1987 that reported that Mr. Green attended individual therapy. The letter from the director of the program, William C. Weschler, LICSW, states that Mr. Green had attended five therapy

appointments. He was described as "open and cooperative in the discussion of his crime and the consequences of his actions. " The letter stated:

> "He appears to understand and accept the seriousness of the crime; however, he contends differences between his version and the victim's version of the crime. Mr. Green has also focused on his past use of alcohol and cocaine, stating his intent to avoid all substance use after his parole. He acknowledges that the use of alcohol and drugs has previously had bad effects on him, causing an escalation in aggressive behavior and getting into trouble. Mr. Green has talked openly about his past life and plans for the future. He has indicated an interest in continuing with counseling once he receives his parole as a means of helping his transition back into the community. I feel that Mr. Green could benefit from such a course of action."

Medical and Mental Health History: Medical records from the Department of Correction Health Services Division show that Mr. Green is in good health. He has a history of vitamin D insufficiency and dyslipidemia. He reported that he takes Zocor, vitamin D, and multivitamins. He has not been involved in mental health treatment through the Department of Correction Health Services Division. Mr. Green said he had never participated in mental health treatment in the community.

Criminal History: Mr. Green reported that he did not have any juvenile offenses. He reported that his first criminal offense was at age 27.

His criminal offense history is outline in the Comprehensive Assessment and includes the following information:

8/5/79: Forgery 1st degree; Released/Dismissed

6/3/83: Disorderly person; Dismissed

6/13/83: No Support; Closed

3/3/86: Assault and Battery, guilty, probation. Victim: Sheila (This offense was not listed in the Comprehensive Assessment but from the Certified Copies of Criminal Convictions.)

4/23/86: Annoying Telephone Calls; Dismissed

5/21/86: Rape, Indecent Assault & Battery, Assault and Battery; Judge revoked verdict, set aside, Rape Nol prossed, other charges Filed, Nol prossed

8/25/86: Assault and Battery, Annoying Telephone Calls, Threatening to Commit a Crime; Probation for Assault and Battery, other charges filed

1/23/90: Possession Class B; 60 days committed and Shoplifting dismissed

4/9/90: Breaking and Entering Daytime w/intent to commit felony (2 counts); 1 year committed for one count, 2 years suspended sentence, one year on and after 1 year suspended sentence and 2 years' probation, Violation of Probation warrant

2/11/91: Trespassing; Dismissed

5/24/91: Rape (dismissed), Indecent Assault and Battery (5 years committed); Assault and Battery (guilty, filed), Kidnapping (dismissed), Poss. of Controlled Substance, Cocaine (guilty, filed) Victim: [redacted]

2/8/94: Breaking and Entering Nighttime; Warrant 10 months committed

3/23/95: Assault and Battery with dangerous weapon (shod foot); Assault and Battery with dangerous weapon (knife), both dismissed

6/12/95: Breaking and Entering nighttime with intent to commit felony; 1 year committed

10/4/96: Knowingly Receiving Stolen Property; Warrant x2 filed

11/20/96: Breaking and Entering Nighttime: 6 months suspended sentence, violation of probation

12/23/96: Breaking and Entering Daytime, Larceny More, Bribery; all dismissed

6/23/97: Rape (5-5 years + 90 days committed), Assault to Rape (5-5 years + 90 days concurrent), Assault and Battery (guilty, filed) Victim: [redacted]

6/3/02: Rape (8-8 years = 1 day committed), Habitual Offender (dismissed after plea), Assault and Battery (2 ½ years committed) Victim: J[redacted]

11/21/03: Warrant for Failure to Register as a Sex Offender

The record notes that Mr. Green had eight incident dates for violations including motor vehicle violations and nonpayment of child support.

HISTORY OF SEXUAL OFFENSES:

Mr. Green's history of sexual offenses is summarized in the Comprehensive Assessment dated 3/14/12 as follows:

> "According to the Board of Probation, Mr. Green has been arraigned on four separate occasions for offenses of a sexual nature. In May of 1986, Mr. Green was arraigned out of Norfolk Superior Court for charges of Rape, Indecent Assault and Battery, and Assault and Battery. He was initially sentenced for this offense on February 13, 1987, with a sentence effective date of April 3, 1986, receiving a 15-year committed sentence for the first charge. The remaining charges were filed. Mr. Green was granted parole from this sentence on October 26, 1987 and while on parole his sentence was overturned. All

three charges were eventually nol prossed on February 4, 1997. The victim of this incident was a 23-year-old female acquaintance.

In May of 1991, Mr. Green was arraigned out of Worcester Superior Court for charges of Rape, Indecent Assault and Battery, Assault and Battery, Kidnapping, and Possession of a Controlled Substance. Mr. Green was sentenced on August 13, 1991 with a sentence effective date of February 20, 1991, receiving a 5-year committed sentence for the charge of Indecent Assault and Battery. The charges of Rape and Kidnapping were dismissed and the remaining charges were (guilty) filed. The victim of this offense was a 23-year-old female stranger. Mr. Green received a Certificate of Discharge from this sentence on October 2, 1993.

In June of 1997, Mr. Green was arraigned out of Suffolk Superior Court for charges of Rape, Assault to Rape, and Assault and Battery. Mr. Green was sentenced on May 28, 1998 with a sentence effective date of May 27, 1997, receiving an overall 5 to 5 years plus 90 days committed sentence for the first two charges. The charge of Assault and Battery was (guilty) filed. The victim of this offense, a 41-year-old female stranger, notes in her testimony that she had never met Mr. Green prior to the offense. Mr. Green received a Certificate of Release from this sentence on May 11, 2002.

On May 31, 2002, 20 days after his incarceration for the sexual offense noted above, Mr. Green committed his fourth sexual offense on record. He was arraigned in September of 2002 out of Plymouth Superior Court for charges of Rape, Habitual Offender, and Assault and Battery. In relation to the charge of Rape, a mistrial was initially declared on October 25, 2006; however, Mr. Green was eventually convicted and sentenced on March 19, 2007 with a sentence effective date of June 3, 2002 receiving an overall 8 to 8 years plus one day committed sentence for this event. The charge of Habitual Offender was dismissed after plea. This victim, a 30-year-old female, also notes in her testimony that she had never met Mr. Green prior to the offense.

As a state inmate, Mr. Green was first transferred to the Massachusetts Treatment Center on October 19, 2007, from MCI-Concord to participate in the Sex Offender Treatment Program (SOTP). Prior to Mr. Green's pending release from incarceration in February of 2010, the District Attorney for the County of Plymouth filed a petition for civil commitment as a Sexually Dangerous Person. An order of temporary commitment to the Massachusetts Treatment Center occurred on January 27, 2010. Probable cause for sexual dangerousness was found on April 9, 2010, and a determination of Sexually Dangerous Person resulting in a civil one-day-to-life commitment occurred on July 18, 2011."

More detailed information about each charge for sexual offenses is described below:

1. **April 1986: Rape, Indecent Assault and Battery, and Assault and Battery**

The Metropolitan Police report dated 4/3/1986 included the following information from the female victim's statement . age 21):

> "...She stated that a black male, known to her only as James, an acquaintance of her brother and sister, asked her if she would like a ride to Mattapan Square. He asked if she would like to ride around the square, she consented and they did so. Then he began driving his vehicle up Blue Hills Pkwy, towards the area where the incident took place. When asked what he was doing he told her that he wanted to talk to her. He pulled the vehicle over, in a parking lot on Unquity Rd., Milton just beyond the Ulin Rink. He then began putting his arms around the victim, and she resisted him. He dropped his left hand down between the seat and the door, there was a sound of something metallic, while doing this he told her that he had a gun in his hand and that if she didn't do as he told her that he would kill her, he is quoted as saying, "he would blow her fucken head off." He demanded that she unbutton his pants, when she didn't do so, he hit her on the head with his hand. He then pulled down his pants, and told her to "give him some head," she then did as he demanded. He did not ejaculate into her mouth. The victim was very upset and embarrassed, and it was difficult for her to talk about the attack, she began crying at this time. He then told her to give him the prescription glasses that she was wearing. He told her to take off her underpants, she took off one leg of the pantyhose that she was wearing, he then demanded that she lay down on the seat of the vehicle. He held his hand behind her back, and she believes that he was holding something in his hand, she thought it might have been the gun. He told her to put his penis into her, she refused. He said to her, "Do you want to get killed." She did it, and he had intercourse with her. He ejaculated into her. After this he told her to sit up, and turn around. He threatened her again. He told her to give him more "head," he kept threatening her, she again performed oral sex on him. She told him that doing that was making her sick, and she stopped. He told her that the problem with doing this is you never know when a chick is going to squeal. I'm going to have to kill you, he said. She stated that she thought he would kill her, she pleaded with him, that she would never say anything about what happened. She told him that she would be too ashamed to tell anybody what happened and that no one would believe her. She stated that they waited there for a long time, he asked her, "What would you do in my shoes." He then told her to take her stockings off again, and again had intercourse with her, this time he was more rougher with her than before. Much more forceful. He told her to undue her blouse and take off her bra, he grabbed hold of her breasts. She is unsure if he ejaculated in her this time. When he decided to leave the parking lot, the vehicle wouldn't back up. He told her to get out of the car and push it, when she did she thought she would be able to run, but he got out with her. When they were able to

drive from the parking lot, he locked all the doors in the car. He began telling her how smart he is. He asked if she knew his name, she said James. He told her that was not his true name, that no one knew his true name. He then dropped her off on the corner of her street. When she got into her home, she called the Harvard Comm. Health Plan, she was told to call the police at once, which she did. She then told her sister, . and her brother what had happened. She also told her mother. An ambulance responded to her, along with the Boston PD, and she was taken to the Brigham and Women's Hospital. She was interviewed there, and examined by a doctor."

Mr. Green's version of the events: The Metropolitan Police report dated 4/3/1986 included the following information from Mr. Green's statement:

"...He stated that he had been talking with the victim's sister before the victim had come home from work. He said he had spoken with the victim on a previous day, the term victim was his, not ours. He said when she arrived home about 4:30-5:00 p.m., he asked her if she would like to have sex, and she said she would. They got into a car that was borrowed from a friend...He stated that he smoked two "joints" while driving around with the victim. He drove to the parking lot, where he asked her if she would like to have sex, and she said she would. He told her if she wants to get me off, he would have to have head first. He said this is common now a days. He stated that she gave him some "head," he didn't ejaculate, then he had vaginal sex with her, and he did ejaculate. He stated that she performed oral sex on him only once, and had intercourse once. He stated that while in the parking lot, the smoked one joint between them. He stated that he smoked either three or four joints, between 2:00 p.m. and the time of the incident. He also stated that he drank one 12 oz. Private Stock beer. After this he said that he dropped her off. He stated that sometime later he was in a fight with a Michael E., a boy friend of the victims. He stated several times that he never used any force, that everything that he did, he did with consent. He stated that he owned no gun, and never has. He did not know why the girl would say that he raped her."

Mr. Green reviewed his offense history with me. Other than to state that he was convicted of the Rape charge in 1986 and served a criminal sentence for that, he was unwilling to discuss this further because the verdict was revoked. Mr. Green stated, "I don't want to talk about that." Court documents state the judgment was reversed and the verdict set aside. There is a note dated 2/3/1997 that the case was nolle prosequi and that "The victim was unwilling to testify in a second trial and the Comm. would be unable to try this case without her testimony."

2. **February, 1991: Rape, Indecent Assault and Battery, Assault and Battery, Kidnapping, and Possession of a Controlled Substance:**

In a Supplemental Report from the Worcester Police Department dated 2/21/1991, the victim) made a statement to the police about the circumstances of the offenses. She

reported that she met Mr. Green for the first time on February 21, 1991. The 23-year-old female victim said she and Mr. Green went to her apartment to use cocaine. Mr. Green invited her to come over to his apartment and to continue using cocaine. Mr. Green called a friend of his who joined them. The victim stated:

> "Me and James smoked some more at James' place. When we finished, I said I didn't want to anymore. He lives in the basement. I started walking up to go out. James followed after me. He started choking me, and he dragged me back in the room. I was screaming. I bit him in the finger. He had the door locked. Some people came to help me, but he wouldn't let them in. He was swinging at me and punching me. He punched me in the eye. He started taking off my clothes. I was still yelling and screaming. He took off his clothes. He raped me. He put his penis in my vagina. When he finished with me, he let me get up. He said I couldn't leave until morning. I fell asleep. I woke up. It was morning. He let me get dressed. I went and called [name]. She came to get me in her car. She saw me coming out the door. He was standing in the door. I said I couldn't talk to her there. I got in the car... We used her phone to call the police. They took me to James' house and they picked him up."

Regarding the 1991 Indecent Assault and Battery conviction, Mr. Green reported that around that time he was drinking and involved with prostitutes. He said, "I just relapsed." He said, "I take responsibility for my crimes and actions." Mr. Green said that he was working at a halfway house at the time this offense occurred. He said he went to Boston and had no support. He had a weekend pass and "somehow or other," he "picked up." Mr. Green was living at a sober house and he said he "had to face the music." He reported that at the time he felt he had let himself down. He was kicked out of the sober house and ended up living in a rooming house. Mr. Green had a job at a car dealership and said he had just gotten paid. He decided to go to Worcester which he understood was a "high risk situation." Mr. Green said he was "looking to get high." He saw a woman whom he described as "attractive" and he engaged her in a conversation about where to find drugs. He said that they went to various places and "did drugs there" and asked the woman if she would like to go back to his place. He asked her if she would "take care" of him and she said no. Mr. Green stated, "That's my distortion." He said that after he had spent all the money on drugs, he believed she should have sex with him. He stated, "I believe I punched her." He said that after that, she said she would have sex with him. He reported they had sex for 10 to 15 minutes and then she spent the night. He said that he has learned in treatment that she might have been afraid to leave at that point. Her friend picked her up in the morning. Mr. Green noted that there were no buses available at the hour of the night when she stayed over. When her friend arrived, she saw that the victim had a black eye. They reported the assault to the police. When I asked Mr. Green why he was charged with an Indecent Assault if he just punched her, he stated, "I touched a female who had no clothes on... and forced sex."

3. **June 1997: Rape, Assault to Rape, and Assault and Battery:**

In the Commonwealth's statement of the case, the following summary is provided:

> "On 5/27/97 the victim was attacked by the defendant as she attempted to open the front door of her apartment. The defendant dragged her down a basement stairwell where he forced her to perform oral sex on him. The victim was able to break free of the defendant and crawl up the stairwell to the courtyard of her apartment complex. While in the courtyard the defendant once again attacked her. Several neighbors came to her aid in response to screams for help. According to several of the witnesses the defendant was on top of the victim with his penis out when he was dragged off the victim by neighbors."

The Boston Police Sexual Assault Unit Report dated 5/28/1997 stated that as the victim approached her door, she was "grabbed from behind" by Mr. Green. Reportedly he called her a "bitch" and dragged her down rear basement stairs. The report stated:

> "He unzipped his pants and she sat down, he forced his penis inside her mouth saying, "Suck it bitch or I'll kill you." This male was punching her about the face and head and he began choking her. He then pulled down the left leg of her beige slacks (she had a black leg brace on her right (over her pants leg) and he layed on top of her and put his penis inside her vagina."

The victim reported that she screamed "rape" and was able to pull away from Mr. Green. She crawled up the stairs while he held onto one of her legs. She reported that her neighbors heard her cries for help and they came outside to find her lying on the ground. They surrounded Mr. Green and did not allow him to leave until the police came. One of the witnesses who spoke to a police officer said Mr. Green made the statement, "That bitch owes me money and she is gonna pay one way or the other." The victim was described as having injuries (face and cheek lacerations, lacerations and abrasions to both elbow and hands). The victim had a brace on her leg and was using crutches. One witness told the Grand Jury, "Her face was bleeding. Blood was coming out of her mouth. And her broken leg where she had the rods and stuff was on—it was like bent backwards. And I tried to reposition her leg, because she kept saying her leg was really hurting."

In the Grand Jury transcripts, the victim stated, "I was hitting him, trying to get his nails out my throat [sic], because I couldn't even breathe. That's how hard he had me around my throat." The victim said she lost consciousness ("blanked out for a minute") during the sexual assault. The victim said she did not know Mr. Green and had never met him before the assault.

Regarding the 1997 conviction, Mr. Green stated that the circumstances in his life contributed to his re-offense. Mr. Green stated that at the time he was working for his father and "didn't feel like I was going anywhere." He stated that he was working part time and had no relationships in his life. He stated, "I felt life was going nowhere." Mr. Green stated that he had

"low self-esteem" and "anger." Mr. Green stated that he was working for his uncle and living in a shelter. He reported that he relapsed on cocaine. He reported that he was high earlier in the morning. He approached a stranger and asked her if she did drugs. She told him she did do drugs and they went together to purchase drugs. He said he took her to "a location" where there was a basement landing under a porch where they used the drugs. He said she performed sexual acts on him (oral sex) and he was not able to ejaculate. She agreed to have vaginal intercourse with him but later refused oral sex. Mr. Green stated that when she refused to have oral sex with him, his "entitlement kicked in again." He said his thoughts were that "this bitch smoked up all my drugs and she will pay one way or another." Mr. Green stated that she called out for help and he was eventually surrounded by people and arrested. When I asked Mr. Green about the police report, he said he agrees with whatever the police report said. When I said there were some discrepancies between his report and the police report (e.g., whether they knew each other prior to the sexual assault and if they had used drugs together), Mr. Green repeated that he agreed with the police version. He emphasized not wanting to minimize his actions, however, he was not able to reconcile the differences with his reports and the police reports. He just repeated that he did not disagree with the police reports.

4. **May 2002: Rape, Habitual Offender, and Assault and Battery**

In a Brockton Police Department Arrest Report dated 5/31/2002, it was stated that a witness reported:

> "...that a black male wearing dark jeans and a black shirt with white lettering had run from Porters Pass area while pulling up his pants. The witness further stated a female was screaming from Porters Pass. [The officer] went down into Porter's Pass and found the victim [name]. She stated a black male 5'11" tall had just raped her. She was covered in debris from the ground and was quite upset. She said she was walking along the tracks with the defendant, James Green looking for a place to smoke some crack. The defendant led her into the woods. While they were in the woods he lunged at her neck grabbing her and forcing her to suck his penis. He held his hand up as if to hit her. She got tired and he punched her in the side of the head (there was a small scratched in the left temple area) he then stated we can be here all night. He kept grabbing her by the neck through out the assault. When the defendant heard something he told the victim to be quiet. The victim's brother witness, / and witness, Richard were approaching looking for the victim. The victim heard her brother's distinctive whistle and then screamed. As witness, , ran to his sister she ran from the brush and said "he raped me". The defendant fled Porters Pass area pulling his pants up and was seen by witness [name] going down the side of 67 Elliott St. The defendant was caught... and the victim ID him as her attacker. The victim said there was never any intercourse just oral sex and she refused medical treatment."

In a report supplement by the Brockton Police Department, it was reported that on 8/20/04, the victim went to the location of the offense with the officers and provided additional information. The victim stated that she and Mr. Green were going to Porters Pass to smoke crack. The report stated:

> "...They went under the railroad bridge and the suspect heard voices off in the distance so he did not want to go straight on the path. Therefore, after walking out from under the bridge, they immediately went to the left and climbed up the hill to a clearing at the top. In order to do this, they climbed over lots of debris including tires and trash. This officer would estimate that it was 20 yards to where the clearing was from after the bridge. No one else was around when they reached the clearing. Victim [name] stated there were a pail and a cement block that day when they got to the clearing and they both sat down on the cement block. The suspect asked her if she had a pipe to smoke, and she did so she began to look for it. The suspect looked as if he was going into his pocket to get the drugs and then he lunged at her throat and she fell on her back. Victim [name] stated that she felt like she could not breathe. Voices could be heard coming towards them. The victim knew it was her brother because of his whistle. The suspect told her to "shut up" and forced her to go into the heavy brush that was about 5 yards away. The victim could remember the suspect telling her that he had and "incredible urge" to bite her ear off. She was able to get in a few screams and the suspect started to run away..."

According to the July 2002 Grand Jury proceedings, the victim stated that during the assault, Mr. Green was "choking" and "strangling" her. She said,

> "We heard rustling up by—near us, and he dragged me into the bushes by my throat. Picked me up off of my feet by my throat into more bushes, and I heard my brother's whistle, and he strangled me more and told me to be quiet, don't say nothing, and I was saying, I won't; I won't, but he was choking me and I couldn't breathe." She said Mr. Green was biting her. She said, "I just screamed because he was hurting me, biting my hands, and he had previously threatened to bite my ear off, so it was scary...He wanted to bite my ear off...He let go of me, and he held me by my throat and he punched me after I was on the ground."

Regarding the 2002 conviction, which Mr. Green described as his "governing offense," he reported that he had been out of prison for just 20 days. He had completed Phase 1 and Phase 2 of the Sex Offender Treatment Program but committed the offense after that. Mr. Green explained that he was living with his father at the time but his father was going on vacation and would not allow Mr. Green to stay in his home during that period. Mr. Green described himself as "homeless." He said he thought his father did not trust him because he might steal from him. Mr. Green's brother was allowed to stay in the home during this vacation. Mr. Green stated that he had "resentment" over the situation. When his brother called him to come into work

early Mr. Green said he had a "distortion" that his brother thought he would "take something" from the house if he was left alone. Mr. Green said he had a beer in the morning. He said he felt resentment and anger. He stated, "By the time I got to Boston, I purchased cocaine and never got back to work." He "ran into a gentleman at the shelter" who joined him doing drugs that morning. The man left Mr. Green after the drugs ran out and Mr. Green had no money. Mr. Green said he was intoxicated and decided to go to Main Street. Mr. Green described the sexual assault at the time as being "carefully planned." He said in the other offenses he made quick decisions but in this case he "sought out" a woman to sexually assault. The woman, [redacted], was a drug addict and Mr. Green thought that if he manipulated her into believing he had drugs, she would go with him and he could sexually assault her. He asked her if she had a pipe he could use and if she knew if there was any place they could go to do drugs. When they went to an isolated area, Mr. Green said he "choked her" after she refused to have sex with him. He said he told her she could "do it the easy way or be here all day." She gave in and agreed to have oral sex with him after he choked her. They heard someone calling her name before he completed the sexual assault. The police were called and Mr. Green was arrested.

When describing his understanding of the most recent sex offense, Mr. Green described that he had a "change in pathways." He said that he knew from dating women and doing drugs with them that he could manipulate women into having sex with him if he provided drugs. In this situation described above, his goal was to sexually offend against this woman. He said he "wasn't worried about getting caught." His thoughts at the time were that nobody would care if he sexually assaulted a homeless woman who was a drug addict. He thought, "who would you believe here [him or the victim]?" Prior to this episode, Mr. Green understood that his sexual offending was based in feelings that had built up inside of him. He said, "The anger... the buildup... feeling cheated, rejected." He said this did not describe "the pathway" to his last offense. He said that there were no drugs involved. When I asked about his report that he was using drugs earlier in the day, he said the effects of the drugs had worn off. However, he said he was "high and lonely" and "wanted to be with a female." He then said, "I'm quite sure I wasn't as high." Mr. Green said that he used the choking as a way to get the victim to comply with him. When I asked about the police report that said he dragged her, Mr. Green said that he was dragging her and holding her mouth to keep her from screaming when other people approached. He said that he was "dragging her from one brush area to a thicker brush area.

November 2003: Failure to Register as a Sex Offender

Regarding the Failure to Register as a Sex Offender that resulted in a warrant for his arrest, Mr. Green reported that he attempted to register, however he was turned away. He said he went to the police station in Roxbury and was sent to a program in the South End. He was not able to register at that program and was eventually charged with Failure to Register. When I asked about the outcome of that case, Mr. Green said it took four years before he was eventually convicted. He said case took so long because he had several attorneys that he fired which delayed his case.

INSTITUTIONAL HISTORY AND DISCIPLINARY REPORTS:

Mr. Green's records show disciplinary reports from Department of Correction facilities that include:

1. 9/1/1992: Out of place, disobeying an order when an officer told him he was out of bounds and arguing back that he was not out of bounds (resulted in a warning).
2. 5/14/1993: Refused a direct order when told to retrieve cereal boxes by an officer.
3. 9/10/1998: Fighting with another inmate and did not stop when ordered to do so; handcuffed and removed from scene.
4. 5/17/2001: Disruptive behavior and not obeying a direct order. He was being interviewed by an IPS officer and became "loud and boisterous" and had to be placed in a holding cell.
5. 8/15/2001: Possession of a tampered hotpot.
6. 1/14/2002: Receiving items of value from another resident.

Records show nine disciplinary reports for insolence to a correctional officer while awaiting trial at Plymouth House of Correction and one additional disciplinary report while awaiting trial for disobeying a direct order.

Mr. Green reported that his only behavioral report at the Treatment Center was three years ago when he had an incident with his roommate. He said they were not getting along and had an argument about the window being open or close. Mr. Green said, "I ended up getting punched in the face." He said he was terminated from treatment for 90 days but was able to return early after "taking responsibility" for the incident.

The Treatment Review Panel note dated 6/13/2012 reported that Mr. Green said before the physical altercation, his bunk mate was using the toilet so Mr. Green opened the window and later shut it partially. The bunk mates then argued about the window being open and/or shut and according to Mr. Green, "I hit him several times. I wouldn't say I lost it but I was angry. I couldn't think of other things to do then. Now, I would have hit the buzzer to have an officer help. [I] could have got a room change." The note stated that Mr. Green reported that he had become "too comfortable" in the room even though the relationship with his bunk mate was deteriorating. The note stated, "Other residents on the unit reportedly encouraged Mr. Green to bring the issues in the room to Primary Group but Mr. Green stated that he simply did not do this. Mr. Green stated that he took responsibility for his own piece "but it would not have happened if he [roommate] didn't punch me." He was given a 60 day suspension from treatment. (Suspensions can go up to 90 days.)

SEX OFFENDER TREATMENT HISTORY:

Mr. Green participated in sex offender treatment while he was incarcerated prior to committing the 2002 offense. He reported completing Phase I and Phase 2 of the program but not completing the full program because he was released.

Prior to being civilly committed, Mr. Green was transferred to the Massachusetts Treatment Center in October 2007 to begin sex offender treatment. In the group progress notes beginning on 6/10/2008, Mr. Green's participation in Pre-treatment in the Statewide Sex Offender Treatment Program is described as consistent. The notes indicate that he was generally attentive and appropriate during the group sessions. In the note dated 2/24/2009, it was reported that Mr. Green presented his autobiography. The note stated, "He had difficulty saying that he has battled with low self-esteem. However, he was able to identify thoughts and feelings that explain his self-esteem issues both in the past and currently." Notes from March 2009 show that Mr. Green presented information about his offenses. The 3/30/2009 note stated, "Mr. Green presented well written work, he now needs to add more victim reaction to his piece, to describe exactly what occurred for the victim. Although he seems upset at having to revise anything Mr. Green was receptive to the feedback." In the 5/4/2009 group progress note, it was reported that Mr. Green "shared his own struggles with addiction." Additionally in the note dated 6/1/2009, it was reported that "Mr. Green seems to take a genuine interest in his group members and makes an effort to speak in every group."

The group progress note dated 10/27/2009 stated that Mr. Green presented his "Low Risk Situations" and his "Risky Emotional States." The note stated that "Mr. Green appears to hold a great deal of resentment with his father. He has difficulty seeing his own entitlement and selfishness growing up." Notes from November 2009 show that Mr. Green was progressing in treatment and had presented "Medium Risk Situations" to his group. The 10/24/2009 progress note stated, "He displayed a fair amount of entitlement in response to some of the here and now issues addressed."

Mr. Green attended Pre-treatment groups until 8/24/2010. He stopped attending treatment after the DA petitioned to have him civilly committed for an evaluation of his sexual dangerousness and he did not return until 4/21/2011.

Mr. Green attended the Here and Now group from April 2011 until August 2011. Progress notes indicate that Mr. Green joined a new primary therapy group on 8/30/2011. Mr. Green was described as an active member of his therapy groups. However, when he participated in the Comprehensive Assessment for treatment, he did not fully participate. In a note dated 2/27/2012, Mr. Green discussed the reasons that he did not answer certain questions during his assessment that related to his offense history. The note stated,

> "Mr. Green went on to explain that he did not have a problem answering questions related to his offenses or discussing them in group but believed that the information he would have put down could have been 'dissected,' which he believes has occurred in the past. Mr. Green stated that he takes 'full responsibility' for his offending behaviors but the facilitator questioned what exactly he was taking responsibility for. He stated that he 'crossed the line' when he felt entitled to sexual acts in return for the drugs he had provided to 'prostitutes, streetwalkers' under the verbal agreement that they would

perform sexual acts in exchange for the drugs. Mr. Green went on to state that he is taking responsibility for what the police reports state and it was asked by the facilitator if he believed there were any discrepancies in the reports. Mr. Green stated that when he has provided his understanding of the events in the past, he has been told that he was not taking full responsibility and that it [sic] why he accepts 'full responsibility' today for what occurred. Mr. Green stated that he has 'done research' and understands that he acted on his entitlement and sexually assaulted the three women. He continued by reporting that he recognizes a pattern of his behaviors but noted that the third assault that occurred in Brockton had more planning because he knew he wanted to go hang in a high crime and drug area but did not realize his intentions until he saw ' Mr. Green stated that the first two assaults were not planned ahead of time but there was a verbal agreement that the women that he provided drugs for would perform sexual acts in return. When these women 'did not live up to their end,' Mr. Green stated he acted on his entitlement because he believed the acts were owed to him. Mr. Green stated that it was not his intention to assault the first two victims until he felt that they owed him something."

In a note dated 4/9/2012, Mr. Green discussed his understanding of his hostility towards women. The note said,

"He stated that growing up he was taught to treat women with respect but reported that he as he became older his viewpoint of women changed. Mr. Green reported that when he was using drugs, he socialized regularly with 'common streetwalkers and prostitutes,' stating that 'if she acted like a whore, I treated her like a whore.' Mr. Green was asked to expand on how he treated women that he viewed as a 'whore,' he stated that he would not respect them because they did not respect themselves. Mr. Green reported that this is currently not his view and that if he were to be in the community he would not be in an environment where drugs are available and 'prostitutes' frequent. He stated it is a 'high- risk area' for himself and that the 'prostitutes' may be in danger due to his past offenses..."

Progress notes indicate that Mr. Green did not attend therapy from April 2012 until July 9, 2012, which was the period of suspension mentioned above.

In a progress note dated 8/13/2012, it was noted that Mr. Green received his Community Access Board report. The report indicated that he provided "selective" information to treatment staff during therapy. The progress note stated, "When asked why he chooses to provide 'selective' information, Mr. Green stated that his words can be taken out of context or misinterpreted."

Mr. Green progressed sufficiently in treatment to move into a Therapeutic Community. He attended his first Therapeutic Community Primary Group on 10/9/2012. In a note dated 10/30/2012, Mr. Green discussed being sexually abused by his uncle as a child. The note stated,

"He described this as an arousing experience, which led to him viewing others as objects and seeking ways to fulfill his sexual needs, including sexually abusing his younger brother. Mr. Green connected this to his hostility towards women and indicated that his relationships with women were primarily focused on sex. He also shared that he received most of his information about sex from the sexual experience with his uncle and from his peers."

Group progress notes show that Mr. Green continued to be an active participant in his groups, providing feedback to other members and discussing some of his own cognitive distortions. The note dated 2/14/2013 stated that Mr. Green discussed his relationships and views of women. The note stated:

> "He began by discussing his involvement with prostitutes during his service in the military and after he got out of the military and began using drugs. He indicated that he had always viewed women as sex objects and learned that he could manipulate prostitutes with money and drugs. He explored how he viewed women as being in different 'categories,' such as 'whores, low class, and working class.' Mr. Green also discussed his difficulty being in a monogamous relationship and reported that he cared about some of the women he was in relationships with, but usually cheated because they 'fizzed out' after time and because of his high sex drive. He was receptive to questions throughout the discussion and reported that he planned to talk about how his views of women and prostitutes led into his offending..."

In a note dated 4/2/2013, it was reported that Mr. Green discussed his hostility towards women and the 2002 offense. The note stated:

> "He discussed the day leading up to the offense and the details of the sexual offense. He noted his use of 'trickery' and manipulation by offering drugs to the victim to get her to a wooded location and the violence he used to 'instill fear' and get her to comply. Group members asked what role his thoughts and beliefs about women played in the offense and Mr. Green discussed how he viewed women who used drugs and prostituted as being easy to manipulation [sic] for sex. Group members engaged in a discussion about classifying people and Mr. Green stated that when he was using drugs and living on the streets he only saw people for what he could get from them. Mr. Green also indicated that his previous offense occurred because there had been an 'arrangement' that the victim would provide sex in exchange for drugs and then changed her mind, but stated that this offense was different in that there was no 'arrangement' and that he knew from the start that he was going to use 'trickery' to get sex. He was encouraged to further explore the differences between the offenses and also what his arousal was during the events."

In a note dated 4/23/2013, it was reported that Mr. Green "shared that alcohol use and interest in prostitutes were factors in his offending." In a discussion about empathy on 5/28/2013, Mr. Green stated "that he was able to suspend empathy at times when he became judgmental of

others, such as his roommate or when he thought of his victim as a prostitute. Group members asked what needs override his concern for others, and Mr. Green indicated that his sexual needs and need to control the victim into complying caused him to be entitled and suspend concern for her." There was a discussion about why Mr. Green would not answer a particular question in the group before thinking about it and he stated that he did "not want to 'ramble' with the wrong answers or say anything that could impact him if it is documented."

Regarding support in the community and social influences, in a 6/25/2013 note, it was reported that Mr. Green identified his brother as a primary support in the community, however, this relationship was identified in testing (Stable 2007) as a negative social influence. Mr. Green "discussed how his brother has been his primary support and he hoped to live with him when he is released. He stated that both he and his brother were involved with drugs at one point, but did not do drugs together or enable each other."

In a note dated 7/16/2013, Mr. Green discussed his sexual relationships with prostitutes. The note stated, "Mr. Green also noted that there were times when he was 'beat' by prostitutes who used his drugs and left before having sex, but did not offend at those times. When asked what was different on the instances when he did become angry and offend, he shared that on those occasions he felt more entitled and his resentment had built to a point where he acted out."

Mr. Green continued to participate in group therapy as an active participant. Notes indicate that he spent several sessions discussing communication issues with other group members and unit members. The therapy groups focused on providing direct and honest communication with each other. The notes indicate that Mr. Green had some success in resolving conflicts with other residents, however, he continued to have difficulties as well. In a note dated 11/19/2013, it was reported that on two occasions, one with an officer and one with another resident, Mr. Green was having issues with communication. The 11/19/2013 note stated:

> "...Mr. Green acknowledged that he has had difficulty holding community members accountable and noted that he has been met with some resistance and negative responses. Mr. Green acknowledged that he can come across as aggressive at times, and was encouraged to consider what changes he could make in the way he approaches and holds others accountable. At a few points in the discussion the facilitators noted that Mr. Green's volume increased and his body language suggested he was frustrated with the questions asked, but he denied feeling frustrated."

In a note dated 12/12/2013, Mr. Green discussed the role of sexual preoccupation in his governing offense the note stated:

> "He reported that he wanted to focus on the time from his release from MCI Gardner and his re-offense a few weeks later. He described how he kept pornography in his locker while incarcerated at MCI Gardner, and indicated that finding a prostitute to have

sex with was a priority after he got out. He also reported watching pornography in his parents' basement and masturbating. When asked what he enjoyed about pornography, he stated that it was stimulating and was a tool for masturbation. Group members continue to ask what he got out of using pornography and noted that it must have been important to him, given that he kept it in his locker in prison. Mr. Green stated that he 'just liked it' and denied that it had any significance for him beyond to sexualize and objectify women. The facilitator noted that Mr. Green seemed defensive and gave him feedback about the importance of questions to help them explore issues on a deeper level. Mr. Green agreed that he could work on his defensiveness."

In a note dated 12/31/2013, it was reported that Mr. Green continued to discuss sexual preoccupation and the circumstances leading to his governing offense. The note stated:

"He discussed using drugs to cope with feelings of rejection and anger that his family did not trust him, and how drugs and sex went 'hand in hand.' He also discussed how he sought the services of prostitutes when he felt lonely and wanted to be with a woman, even though he recognized the potential for relapse to drug use because drugs and prostitutes were often connected..."

Mr. Green discussed the pathways for his offenses in a 1/28/2014 group. The note stated:

"He shared that he believed his first two offenses were approach-automatic because he did not originally intend to sexually offend, but responded aggressively and used force when they did not do as he wanted. He noted that he did not want to hurt the victims, but suspended empathy in the moment and used aggression and force because he felt entitled. He discussed how he learned from certain family members as a child that using force and aggression could give control over a situation. Mr. Green discussed how he utilized more planning and active strategies in his governing offense and intended to offend from the beginning."

In a Group Progress Note dated 2/20/14, an incident where Mr. Green made a sexualized comment to another resident was reported. The note stated:

"... Mr. Green explained that he had approached a community member a few days earlier because he perceived something inappropriate was occurring between that individual and another resident. He acknowledged that he stated "hey, nice erection" to the individual as a way to let the individual know that he knew what was occurring and to hold him accountable. He claimed that he also wanted to share that he felt uncomfortable about what he believed he witnessed. Mr. Green received feedback that those messages were not delivered in a direct manner, and he acknowledged the comment could have been interpreted as a sexual proposition. Mr. Green acknowledged that his behavior was partly "vindictive" because he wanted the individual to feel how

> he felt previously, when that individual reported something about Mr. Green to IPS without talking first..."

In a note dated 2/25/2014, a similar incident was discussed in group. While Mr. Green noted that he had made "joking threats" in the past, he did not believe he had made a threat to another group member. Some group members disagreed with him and felt that the statement he made "was, in fact, a threat." The note stated, "it was suggested that he work on more directly communicating if he chooses to hold someone accountable, and cease making sarcastic and threatening comments. Mr. Green stated that he felt uncomfortable having to bring this issue to group, especially after discussing a similar issue the previous week, and stated his intentions to work on the issues discussed." The treatment team recommended that Mr. Green "should continue to work on communicating more effectively and decreasing his use of sarcastic/aggressive comments. He should also address the manner in which he holds others accountable and explore the feedback he has received about controlling others."

In a March 7, 2014 Individual Treatment Plan, it was reported that Mr. Green was placed on an Individual Behavior Plan (IBP) because he "evidenced difficulties in his interpersonal relationships and effective communication." The plan stated, "In addition, concerns have been raised that Mr. Green is overly focused on others' behaviors and has misused the accountability system." He was described as having "made sexualized or aggressive comments" in recent weeks. His behavioral plan included the recommendations that Mr. Green "fully explore his role in recent interpersonal conflicts and his use of aggressive statements towards peers," and "discuss his use of sexualized comments and how this is connected to the risk factors of sexual preoccupation and deviant sexual interests." It was recommended that he improve his communication skills with peers, refrain from getting any observation of behavior reports, and "take full responsibility for any negative behaviors he engages in."

In a note dated 3/18/2014 it was reported that Mr. Green discussed his Individual Behavioral Plan with the group. The note stated:

> "He read the plan to the group and discussed his difficulties holding others accountable. He shared that he has received feedback that he can come across as aggressive when he gives feedback or holds people accountable, and acknowledged that he can be demanding or tell people they should or should not do something. He explored how this is connected to his expectations of how others should act and his frustration or irritation when they do not meet his expectations. He identified an intervention of talking to his support team before approaching someone and received feedback about identifying other interventions if that is not possible in the moment. Mr. Green discussed a few recent situations where he has practiced having patience and reminding himself not to put certain expectations on people. He acknowledged that it can be difficult because he "likes power and control," but noted that he will need to give that up sometimes if he wants to build his patience..."

Mr. Green continued to discuss his Individual Behavioral Plan with his group on 3/27/2014. One of the issues that he addressed was being "overly focused" on others behaviors. He described being hyper vigilant due to his growing up in "rough neighborhoods". Group members provided feedback that he is sometimes perceived as "staring at them or monitoring their behavior." Mr. Green defended his need to be suspicious of others until he can confirm what their intentions are "but stated that he did not see this as problematic."

In a note dated 4/8/2014, Mr. Green continued to discuss his Individual Behavioral Plan "and explored his difficulties with effective communication." Mr. Green "acknowledged that his ability to communicate is affected when he feels frustrated and angry." A note dated 5/6/2014 evaluated Mr. Green's progress as the following: "Mr. Green maintained his usual level of engagement by discussing a treatment issue and offering feedback to peers. Mr. Green appears motivated to continue improving his communication and relationships with peers and demonstrated progress on his problem solving by exploring possible solutions to resolve an interpersonal conflict with a peer."

In a note dated 6/10/2014, it was reported that Mr. Green discussed the pathways for his offenses. The note stated:

> "He believed that he had an approach – explicit pathway in his governing offense because there was planning and grooming involved. He believed that he had an approach – automatic pathway for the first two offenses because he did not plan them and only sexually offended after he was triggered by the victims 'tricking' him out of his money. He discussed why being 'tricked,' or someone not doing what they said they would, was such a trigger and said that it caused him to feel angry and entitled to get what he was promised by the victims."

Mr. Green went on to discuss how "his lifestyle involved manipulation of others and he noted that he got good at tricking people, so he did not like when it happened to him." Mr. Green discussed the role of using drugs and how this posed high risk situations for him.

In a note dated 7/3/2014 there was a discussion about Mr. Green's need to find another support team member. It was noted that his "difficulty finding support team members suggests that he may continue to have some interpersonal difficulties with peers."

Mr. Green discussed his past and current sexual fantasies during a group on 7/8/2014. The note stated:

> "He reported that [he] used to engage in fantasies about having sex with prostitutes and manipulating and tricking them. He reported that his fantasies today are mainly about women, including prostitutes but not those who he offended, who he had sex with in the past. He reported that he just thinks about the sexual act and only has fantasies for the purposes of masturbation. He said that he believes his fantasies are appropriate today because he does not think about manipulating."

In a note dated 7/29/2014, it was reported that Mr. Green shared a recommendation from his Annual Review "regarding him further exploring whether there was anything problematic about having sexual fantasies solely focused on sexual acts." The note stated:

> "Mr. Green described how the relationships he was in (which he recalled in his fantasies) did involve more than just sex, but he did not find those elements arousing for the purpose of masturbation. Mr. Green acknowledged that the intimacy leading up to sex was not sexually arousing to him in real life either, but noted that he wants to have a relationship that is healthy and intimate in the future because he knows that is better for him. He was encouraged to explore whether that is realistic, given that he has not been interested in that historically. A group member asked whether Mr. Green sought the types of relationships he did and used prostitutes because it was arousing to have control over someone. Mr. Green denied that he was aroused to control and said that the control and violence involved in his offending was not sexually stimulating to him. He noted that he was excited by the thought of finding a prostitute and having his sexual needs met and sexually aroused when the sex acts occurred, but not while being violent. He described needing to use violence because the victims would have otherwise left without him getting what he wanted (sex). He was encouraged to further explore the connection between arousal and violence."

In a note dated 8/14/2014 the group discussed Mr. Green's Annual Treatment Review related to his motivation and engagement in treatment. The note stated that while Mr. Green was active in treatment, his approach to treatment could be "concrete." The note stated "that once he has discussed an issue, he appears to view it as complete and moves on to another one. Mr. Green reported his willingness to continue to repeat the discussions. This writer noted that it is this perspective that appears Mr. Green is discussing issues for the treatment team rather than for his own insight."

In a note dated 10/2/2014, it was reported that "Mr. Green additionally noted he wished to discuss his history of utilizing prostitutes and the link to his deviancy. He noted that he had never utilized the services of a prostitute prior to joining the military, though reported his aunt was a prostitute. He noted in his offending he preferred females who would want drugs for sex. Mr. Green was asked to consider this. He reported that he knew they would do what he wanted them to do. He was asked his view of these women and noted his belief at the time that their purpose was for sex."

The Psychoeducational Class Logs show that while he was in the Statewide Sex Offender Treatment Program prior to being civilly committed, Mr. Green passed: Phase I and Phase II, Orientation, Begin Intro Workbook, Complete Intro Workbook, Begin Basic Concepts, Complete Basic Concepts and Clinical Transitioning. After his civil commitment, Mr. Green completed: Healthy Interpersonal Relationships, Roots of Aggression and Development of Pro-Social

Attitude, Cognitive Restructuring, Understanding Pathways to Offending I, II, and III, and Understanding Sexual Interests.

The psychoeducational class participant evaluations reflected that Mr. Green consistently attended and passed the psychoeducational classes. The evaluation dated 5/1/2012 for Healthy Interpersonal Relationships showed that Mr. Green completed the class successfully. The general comments about his participation stated that he was an active member of the class who prepared his assignments and attended regularly. The note stated that overall, Mr. Green made progress with intellectually understanding the components of the class. He explored past relationships but he seemed "to have difficulty with expressing himself effectively in the moment, which appeared to build resentment within his relationships. This is an area to continue to build upon, as Mr. Green would benefit from appropriately asserting himself when necessary. He seems to have a tendency to be passive during some situations and then can become aggressive due to not effectively processing his thoughts and feelings. This seems to be reflected within different interpersonal relationships and the role in which he defines himself as."

In the Understanding Sexual Interests I class, the Participant Evaluation dated 3/15/2013 reported that Mr. Green completed the class "and built a foundation of understanding the material associated with this class." In the General Comments, it was stated:

> "Mr. Green regularly attended class, completed all of his assignments, and participated in the final project by completing a collage. His weekly written assignments indicated an understanding of the concepts associated with the class and the majority of the assignments fulfilled the expectations. Mr. Green was able to discuss how his distorted views of women influenced his offending behaviors, as well as discussing how he utilized drugs as a means of manipulating others. Throughout the quarter, Mr. Green expressed his deviant interests by identifying that he would assault women that he believed were vulnerable, including women who were known to him as 'prostitutes' and women actively using substances. He also identified how he perceived his escalation in preoccupation through use of pornography and masturbation. Mr. Green completed the class requirements and is encouraged to continue with the subsequent class when clinically indicated to do so."

Mr. Green passed the class Understanding Pathways to Offending I. In the 6/6/2013 participant evaluation, it was reported that Mr. Green was a regular participant in the class and demonstrated "a thorough understanding of the course material." It was reported that he achieved all the class goals and passed the final exam. He went on to complete Pathways II and III. The participant evaluation for Pathways III dated 2/12/2014 stated that Mr. Green "exhibited in adequate understanding of concepts presented in this class learning styles of self-regulation, strategies related to goal attainment, as well as goal types. He demonstrated good understanding of the offense pathways through class assignments, homework, class discussion,

and the final exam. Mr. Green showed the ability to differentiate between pathways based on their components as well as identify pathways to offending from scenarios provided."

In the January 2013 Participant Evaluation for cognitive restructuring, it was noted that Mr. Green completed the class. The notes stated, "Mr. Green put effort into understanding the material and gaining insight into his distorted thought patterns overall, through his assignments, class participation, final project and final examination. He demonstrated a sufficient understanding of the material in order to complete the class. He is encouraged to continue to utilize the techniques and skills he learned in class to challenge his distorted thought patterns."

In the Community Access Board Annual Review dated 8/1/2013, the report stated:

> "The Board is pleased that Mr. Green has made a commitment to attend his assigned treatment group on a regular basis. We also take note of the fact that he is actively participating in treatment. However he is still participating in a 'superficial' manner and has not yet made significant changes that might mitigate his substantial risk of sexual re-offense. We encourage him to maintain a consistent level of participation in the treatment program and to follow the treatment recommendations outlined by his treatment team. We also encourage him to undergo a PPG in order to assess the current status of his deviant arousal. We encourage him to remain OBR-free and to avoid any further suspensions of treatment. His participation in treatment should include his discussing past and present sexual fantasies, as well as the specific elements of all of his sexual offenses (charged and uncharged) in detail. He needs to participate in any recommended psychoeducational classes. We encourage him to continue to discuss, in detail, all of his sexual offenses so that he can develop a full understanding of the factors related to his offense pattern. He needs to participate in substance abuse classes and programming."

In the Massachusetts Treatment Center Contact Note dated 10/1/2014, Mr. Green discussed his discharge planning with Patricia Johnston, M.Ed. The contact note stated that Mr. Green planned to go to a shelter transition house in Worcester, MA. until he secures a permanent residence. He stated that he would continue sex offender treatment in the community. Additionally he stated that he would be attending AA, support groups and "1:1 mental health counseling." The note stated that Mr. Green "reported he will be taking advantage of all resources in the community for his transition back into society. Mr. Green stated he has his brother, Keith Green for a support person while he builds up support people from his support systems."

CLINICAL INTERVIEW AND CURRENT MENTAL STATUS:

I met with Mr. Green at the Massachusetts Treatment Center on December 18, 2014 for approximately two hours and 50 minutes. Mr. Green was cooperative throughout the interview although he responded to questions in a guarded manner. He presented information in what seemed to be a prepared manner and had some difficulty responding to follow-up questions or elaborating further on his response when the information was contradictory or unclear. For example, Mr. Green gave his version of one of his offenses. The police version was different. When I asked Mr. Green about the discrepancies, he said, "I agree with the police report." When I pointed out that was not what he told me when he presented his version of the events, he repeated, "I agree with the police report." I asked for him to clarify how he could agree with two different versions of the offense, he was unable to do so. He reverted back to statements such as, "I take full responsibility" or "I agree with the police report." As a result, some of his responses seemed illogical and rigid. At times, he seemed to be using terms from therapy ("my distortions," "entitlement," etc.) that needed clarification in the context of what he was saying. However, he had difficulty elaborating on his responses and repeated the same statements. When I asked follow-up questions, Mr. Green appeared to be impatient and slightly irritable even though he expressed a willingness to respond to any additional questions. His affect was constricted. Mr. Green was lucid and coherent throughout the interview.

When I asked Mr. Green about his treatment program, he reported that he has participated in treatment since 2007. He said he has spent time looking into his sexual deviance and understanding his "offense pieces." He said he has looked at his thoughts feelings and behaviors and tried to understand his deviant cycle. Mr. Green reported that since he has been in the Treatment Program, he has learned to deal with his anger. He said that in the past he expressed his anger by acting out physically. He acknowledged that when he began the Treatment Program, he was sexually dangerous, however, he believes that now he understands his patterns of behavior and is no longer sexually dangerous. Mr. Green acknowledged that in the past he was "doing the same thing over again".

Mr. Green reported that in Primary Group he has learned to understand why he acted out sexually. He said he would not blame drugs, however, "drugs played a good role in it." Mr. Green stated, "I was responsible. Drugs enabled me to think less clearly." He said that through treatment and doing work such as cognitive restructuring, he has learned to deal with his anger. Mr. Green said that he has learned to use conflict resolution rather than acting out. Mr. Green stated that he no longer has "anger issues" in the same manner as he had at the time of his offending.

Mr. Green describes his circumstances at the time of his offenses as being stressful. For example, Mr. Green said that he lived with his father and "was feeling rejected." After he was incarcerated, he said he sent money home in order to buy a car and reestablish his life in the community, however, when he got home his father had spent the money. Mr. Green said this

sort of event contributed to the feelings that he had about not being respected and feeling angry. Mr. Green said at the time, he "stuffed" his feelings. Mr. Green said he went in a "vicious circle" of dealing with his feelings of rejection and anger by acting out. Mr. Green stated that he sexually assaulted women when he felt angry. Mr. Green stated "when I got angry, I didn't know how to intervene." He said he learned to "manipulate females," particularly prostitutes, into trading sex for drugs or money.

Mr. Green stated that he "used sex as a way of coping." He said he "covered up" his feelings which he described as frustration and resentment. He said he looked for "instant gratification." Mr. Green attributed his feelings of anger and frustration to his relationship with his father. He stated that he would trade drugs for sex or pay for sex with prostitutes. Mr. Green stated, "when they said no, that's when the violence came in...the rapes."

Mr. Green reported that he has signed up to take the PPG (penile plethysmograph), however, there are "other people ahead of [him]" and he has not been assessed yet. He said he signed up over one year ago. (There is a note in Mr. Green's chart dated 9/11/2013 that he wrote requesting a PPG.) Mr. Green stated that he does not believe the assessment will show that he is aroused to violence. He said he is not aroused towards sexual violence. He was not sure what other "deviant sexual interest" would be shown, however he thought "hostility towards women" might be an issue. Mr. Green said his therapist had recently left but told him that the PPG was "not urgent" for him. He said they had already "covered everything in group." When I asked about the level of violence that he used during his sexual offenses, Mr. Green reiterated that he was not aroused to violence. In his last offense he said his "erection went away" during the assault but he was "still wanting to have sex." Mr. Green said he was still "horny" and wanted "instant gratification." Mr. Green said that the violence was all based in anger. He again tied his anger to his relationship with his father. Mr. Green said that he is "not a person who goes around fighting." He compared the violence of his breaking and entering to the violence of his sexual assaults. He said the breaking and entering was "violent" because he "broke windows in order to steal drugs." He described his sexually assaultive behavior towards women as violent but also being related to his drug use. He said he was freebasing cocaine and he said, "That's when a lot of my problems began." Mr. Green reported that he had been to detox programs and halfway houses to address his substance abuse problem. Regarding the sexual violence, Mr. Green said the issue of "sexual sadism" has been raised in his treatment but he repeatedly denied that he is sexually aroused to sexual violence or injuring women during sex.

Regarding his Sex Offender Treatment Program, Mr. Green stated that he was in the state program from 2007-2010. At that point he completed the Workbook phase, the Basic Concepts phase, and had worked on reviewing his offenses ("offending piece"). He did not complete the final phase of treatment because his criminal sentence ran out and the DA petitioned for his civil commitment. Mr. Green reported that he was in the temporary status awaiting

determination of his sexual dangerousness for 19 months. He attended the "Here and Now" groups for about three months and then stopped going. He said that he found the groups to be repetitious, however, he said he would have stayed in the group if he had known he "should have done" that.

Since his civil commitment, Mr. Green said that he completed the Pathways Classes (1-4) all in one year. He reported that he also took the victim empathy class and passed that. He is currently in the substance abuse class. He goes to AA meetings which are held once a week on the unit. Mr. Green reported that he has been in the Therapeutic Community for two years.

Regarding his plans for the community, Mr. Green said that he would need to set up a support system. He said the Community Access Board advised him that he should find transitional housing and not be homeless. He said he understands that he should go to AA or NA in the community and continue to work on the steps. He said he plans to be clean and sober and "change 100%." Mr. Green believes that he can deal with his feelings differently by not letting them "get built up, pent up inside." He said he understands how to deal with conflicts by using conflict resolution strategies. He said that he will attend counseling in the community. He will use his brother, Keith, as a support person. He said his brother can help him recognize if he is "going down some path" that he shouldn't and "get help." Mr. Green stated that he would go to a counseling group ("CPC") to continue with sex offender treatment. He said he has two friends who were in the Treatment Center and now are outside doing well. He will use them for support. Mr. Green noted that he has a daughter whose support is "up and down." He said he tries to keep in contact with her. He also has a four year old granddaughter.

Mr. Green stated that his goals were to live "a better life" and become "a productive member of society." He said he would like to refrain from drug and alcohol use and "live a healthy life." Mr. Green said he would like to get into a healthy relationship and help out his family. He said he would like to be employed. He described family and relationships as important. He raised the issue that he has $67,000 in child support outstanding and he would like to address that. Eventually Mr. Green would like to own a car and be able to go on drives. He would like to spend time watching movies, working, and staying in good physical shape. Mr. Green has been working in the kitchen at the Treatment Center. He would like to obtain employment in a restaurant or in the food business. He said he would go to temporary agencies at first to secure employment. Mr. Green said, "I don't want to get into high risk situations."

DISCUSSION:

Mr. James Green is a 56 year old male who was first arrested for a sexual offense in 1986 when he was charged with Rape, Indecent Assault and Battery, and Assault and Battery. Initially he was convicted of Rape and sentenced for this offense, however, the verdict was overturned in 1997 after he served a portion of his sentence (less than 1 year). The case was not prosecuted after that. In 1991, Mr. Green was charged again with Rape, Indecent Assault and Battery, Kidnapping, and Possession of a controlled substance but convicted on just the Indecent Assault

and Battery charge with the other charges either filed or dismissed. Mr. Green was arrested in 1997 for charges of Rape, Assault to Rape, and Assault and Battery. He was convicted for the two sexual offenses; the Assault and Battery charge was filed. Mr. Green was arraigned in 2002 for Rape, Assault and Battery and Habitual Offender. In 2006, he was found guilty of the Rape and Assault and Battery charges and the Habitual Offender charge was dismissed. In addition to the sexual offenses stated above, Mr. Green has multiple arrests and convictions for non-sexual offenses and has served criminal sentences for both the non-sexual offenses and the sexual offenses.

For much of his adult life, Mr. Green has been involved in the criminal justice system through incarceration, parole, probation, and by incurring criminal charges for sexual and non-sexual offenses. Mr. Green's time in the community has been limited due to his repeated recidivism, including his last offense which occurred 20 days after his release from prison in 2002.

Mr. Green is listed as a Level III Sex Offender with the Sex Offender Registry Board. In November 2003, a warrant was issued for Failure to Register as a Sex Offender.

Mr. Green participated in sex offender treatment prior to the 2002 offense. He then participated in the Sex Offender Treatment Program at the Massachusetts Treatment Center for state inmates beginning in October 2007. He was temporarily committed for evaluation of his sexual dangerousness in January 2010 and he was civilly committed at the Massachusetts Treatment Center as a Sexually Dangerous Person on July 19, 2011.

Regarding diagnostic issues, The Diagnostic and Statistical Manual of Mental Disorders 5 describes the diagnosis for Antisocial Personality as follows:

A. A pervasive pattern of disregard for and violation of the rights of others, occurring since age 15 years, as indicated by three (or more) of the following:
   1. Failure to conform to social norms with respect to lawful behaviors, as indicated by repeatedly performing acts that are grounds for arrest.
   2. Deceitfulness, as indicated by repeated lying, use of aliases, or conning others for personal profit or pleasure.
   3. Impulsivity or failure to plan ahead.
   4. Irritability and aggressiveness, as indicated by repeated physical fights or assaults.
   5. Reckless disregard for safety of self or others.
   6. Consistent irresponsibility, as indicated by repeated failure to sustain consistent work behavior or honor financial obligations.
   7. Lack of remorse, as indicated by being indifferent to or rationalizing having hurt, mistreated, or stolen from another.
B. The individual is at least age 18 years.
C. There is evidence of conduct disorder with onset before age 15 years.
D. The occurrence of antisocial behavior is not exclusively during the course of schizophrenia or bipolar disorder.

Because Mr. Green does not have any known history of conduct disorder before age 15, he does not fully meet the diagnostic criteria for Antisocial Personality Disorder. Instead, Mr. Green meets the criteria for Other Specified personality disorder with Antisocial Traits. He meets the general criteria for a personality disorder with "an enduring pattern of inner experience and behavior that deviates markedly from the expectations of the individual's culture, is pervasive and inflexible, has an onset in adolescence or early adulthood, is stable over time, and leads to distress or impairment."

Regarding risk assessment, there are both static and dynamic factors to consider. Static factors are unchangeable factors over which Mr. Green has no control but are statistically related to sexual re-offending. The Static-99R is an actuarial risk assessment scale designed to predict sexual and violent recidivism. The Static-99R uses ten static or unchangeable variables identified in the research literature as being correlated with sexual recidivism among men who have previously been convicted of at least one sex offense. Each of the ten variables is rated and then a total score is calculated. The total score can be translated to a relative risk category. Mr. Green's total score was 7 which places him in the High risk category.

The static risk variables that were present for Mr. Green include: index non-sexual violence (Assault and Battery), prior non-sexual violence convictions (Assault and Battery, 1991, 1986), prior sex offenses including charges (1997-2 charges, 1991-2 charges, 1986-2 charges; 1997-2 convictions, 1991-1 conviction), prior sentencing dates, unrelated victims, and stranger victim.

Question Number	Risk Factor	Codes	Score
1	Age at release	Aged 40 to 59.9	-1
2	Ever Lived With	Ever lived with lover for at least two years No	0
3	Index non-sexual violence-any convictions		1
4	Prior non-sexual violence-Any convictions		1
5	Prior Sex Offenses	Charges: 6 Convictions: 3	3

6	Prior sentencing dates(excluding index)	3 or less	1
7	Any convictions for non-contact sex offenses		0
8	Any unrelated Victims		1
9	Any stranger Victims		1
10	Any male victims		0
	Total Score		7

In addition to static variables associated with sexual re-offending, there are dynamic, changeable variables that are associated with sexual re-offending. For Mr. Green, dynamic variables that continue to be factors that could contribute to re-offense risk are: lack of social supports, intimacy deficits, hostility towards women, lack of concern for others, impulsivity, issues with authority, difficulty with problem-solving, negative emotionality (anger), poor sexual self-regulation and using sex to cope, deviant sexual arousal, and poor cooperation with supervision.

Mr. Green has actively participated in sex offender treatment both before and after his civil commitment as a Sexually Dangerous Person. While he is learning some of the terminology of sex offender treatment, he continues to show a lack of integration of the material. It appears that he has a set of "correct" answers and he is not able to veer from those responses to demonstrate an integration or understanding of his past sexual offending. He seems somewhat stuck on the concepts of taking full responsibility and agreeing with the police reports, regardless of his actual understanding of the circumstances. He continues to blame the victims of the offenses by suggesting and repeating that they were prostitutes that were not keeping up their end of an agreement to exchange sex for drugs. The fact that he chose victims who were drug addicted and more vulnerable demonstrates the predatory nature of his offending. He significantly minimizes the level of violence that was involved in the offending. Based on the police reports, it is clear that the victims feared for their lives and the excessive force that Mr. Green used while sexually assaulting these women shows either a blatant disregard for the potential injury to them or deviant sexual arousal towards violence (or both). This area has not been explored by Mr. Green and is clearly a central feature of his past sexual offenses. It is concerning that as recently as July 2014, Mr. Green continued to engage in sexual fantasies about prostitutes, his victim pool, which would reinforce his sexual arousal towards them. Deviant sexual arousal towards violence is an unexplored area in Mr. Green's treatment and his

denials about feeling sexually aroused while raping women lacks credibility. Victims reported that Mr. Green punched, bit, choked, and strangled them until they could not breathe (one victim reported losing consciousness); victims were bruised and bloodied during the sexual assaults and Mr. Green continued to sexually assault them. This strongly suggests deviant arousal to sexual violence.

Reports from the treatment team indicate that Mr. Green continues to present "selective" information during therapy. This was consistent with his presentation during the clinical interview that I conducted on 12/18/2014. His understanding of the factors that contributed to his offending has been described as "superficial." With both clinicians and peers, Mr. Green uses defensiveness and irritability to deflect further inquiry into his patterns of behavior and history of sexual offending. He describes his interactional style as "becoming entitled"; this combination of narcissism and anger needs to be explored further in his treatment program because features such as these contributed to his sexual offending. Mr. Green has begun to address some of the dynamic factors related to his offending in treatment, however, he overestimates his progress and then becomes defensive about feedback. Mr. Green has not demonstrated an in-depth understanding of the factors that contributed to his sexual offending. Rather, he has developed a limited understanding of his offending that continues to externalize responsibility. He has not integrated his understanding of his sexual offending to sufficiently to alter his behavior.

Regarding Mr. Green's issues with authority and supervision, his history shows an unwillingness or inability to conform to the requirements of supervision in the community. When he was in the community, he engaged in criminal misconduct while under court supervision (resulting in re-arrests and violations of probation) and he failed to register as a sex offender, also resulting in criminal charges.

Despite participation in sex offender treatment while incarcerated, Mr. Green went on to reoffend in the community. It is notable that he kept pornography in his locker while he was in the Sex Offender Treatment Program because that would suggest a lack of full engagement in the treatment principles while attending the program. It was noted in the 2011 Qualified Examiner report written by Dr. Carol G. Feldman that Mr. Green committed the governing sexual offense 21 days after he was released from incarceration. He had participated in the Sex Offender Treatment Program and even though he completed Phase 1 and Phase 2, he told Dr. Feldman, "I didn't have any treatment.... When I got out I didn't consider myself having treatment." Since then, he participated in sex offender treatment from 2007-2010, essentially starting over in treatment. He briefly dropped out of treatment from 2010-2011 pending his civil commitment, and re-engaged in treatment in 2011. Since 2011, Mr. Green has attended treatment, with one suspension, but otherwise with consistent participation. He moved into a therapeutic community in 2012 after his civil commitment where he is continuing to participate in sex offender treatment.

It is difficult to identify protective factors or factors that are associated with reducing recidivism for Mr. Green. He has job skills and a history of employment, however, when he was in the community, he engaged in sexual and non-sexual offenses even when he was able to work. His social support network is weak and his ability to develop new, prosocial relationships is weak. Mr. Green's medical history does not indicate any significant medical condition that would affect his capacity to re-offend.

SUMMARY AND RECOMMENDATIONS:

Using the Static-99R, those who scored as Mr. Green scored have a High risk for sexual re-offense. Dynamic variables that remain present and contribute to sexual re-offending include a lack of social supports, intimacy deficits, hostility towards women, lack of concern for others, impulsivity, issues with authority, difficulty with problem-solving, negative emotionality (anger), poor sexual self-regulation and using sex to cope, deviant sexual arousal, and poor cooperation with supervision.

In considering M.G.L. Chapter 123A, Section 1, Subsection I, the following is noted:

a. Mr. Green has committed sexual offenses that serve as a threshold for considering sexual dangerousness.
b. Mr. Green has demonstrated repetitive and compulsive sexual misconduct with four convictions for sex offenses including Rape (2 convictions), Assault to Rape, and Indecent Assault and Battery.
c. In my opinion, Mr. Green meets the diagnostic criteria for Other Specified personality disorder with Antisocial Traits which has resulted in compulsive sexual misconduct towards women. Therefore, in my opinion, Mr. Green meets the statutory definition of "Mental Abnormality" which affects his emotional/volitional capacity in such a manner as to predispose or incline him to commit sexual acts to a degree that "makes him a menace to the health and safety of other persons."
d. In my opinion, Mr. Green is likely to re-offend sexually if he is not confined to a secure facility.

With respect to the standard for sexual dangerousness in M.G.L. Chapter 123A, Section 1, Subsection iii, the following is noted:

a. Mr. Green was previously adjudicated as a Sexually Dangerous Person on 7/19/2011.
b. In my opinion, Mr. Green's sexual misconduct was both repetitive and compulsive.
c. Mr. Green's sexual misconduct included rapes, assault to rape and indecent assault to rapes against women. Victims included acquaintances and strangers. While sexually assaulting the victims, Mr. Green threatened, punched, bit, choked and/or strangled them. Victims were bloodied and bruised during the sexual assaults.

d. Mr. Green has participated in sex offender treatment but there has been insufficient therapeutic progress to reduce Mr. Green's risk of sexual re-offense, therefore, in my opinion, his sexual desires remain uncontrolled or uncontrollable should he be released.

In my opinion, Mr. Green meets the criteria for sexual dangerousness under both M.G.L., Chapter 123A, Section 1, Subsection I and Subsection iii.

Respectfully Submitted,

DocuSigned by:
Nancy Connolly, Psy.D.
499D5912875A40A...

Nancy Connolly, Psy.D.
Licensed Psychologist, Qualified Examiner

References

American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders, 5th Edition*, (2013), American Psychiatric Publishing, Virginia.

Babchishin, K.M., Cortini, F., & Nunes, K.L. (2011). Measuring treatment change in sex offenders: Clinical and statistical significance. *Criminal Justice and Behavior*, 38 (2), 157-173.

Beggs, S.M. & Grace, R.C. (2011). Treatment gain for sexual offenders against children predicts reduced recidivism: A comparative validity study. *Journal of Consulting and Clinical Psychology*, 79(2), 182-92.

Bradford, J.M., Firestone, P., Jensen, T.L., Nunes, K.L., & Wexler, A.F. (2007). Incarceration and recidivism among sexual offenders. *Law and Human Behavior*, 31, 305-318.

Bussiere, M.T. & Hanson, R.K. (1998). Predicting Relapse: A meta-analysis of sexual offender recidivism studies. *Journal of Consulting and Clinical Psychology*, 66 (2), 348-362.

Cerce, D., Knight, R.A., Lee, A.F., Prentky, R.A. (1997). Recidivism rates among child molesters and rapists: A methodological analysis. *Law and Human Behavior*, 21 (6), 635-659.

Cumming, G., Hoke, S.E., Livingston, J.A., & McGrath, R.J., (2003). Outcome of a treatment program for adult sex offenders. From prison to community. *Journal of Interpersonal Violence*, 18 (1), 3-17.

Doren, D.M. (1998). Recidivism base rates, predictions of sex offender recidivism, and the "sexual predator" commitment laws. *Behavioral Sciences and the Law*, 16, 97-114.

Garrick, T., Kirkish, P., Phenix, A. Sreenivasan, S., & Weinberger, L.E. (2000). Actuarial risk assessment models: A review of critical issues related to violence and sex offender recidivism assessments. *The Journal of the American Academy of Psychiatry and the Law*, 28 (4), 438-448.

Guay, J.P., Knight, R.A., & Parent, G. (2011). An assessment of long-term risk of recidivism by adult sex offenders: One size doesn't fit all. *Criminal Justice and Behavior*, 38 (2), 188-209.

Hall, R.C. (2007). A profile of pedophilia: definition, characteristics of offenders, recidivism, treatment outcomes, and forensic issues. *Mayo Clinical Proceedings*, 82 (4), 457-471.

Hanson, R.K. (2002) Recidivism and Age. Follow-up data from 4,673 sexual offenders. *Journal of Interpersonal Violence*, 17 (10), 146-1062.

Hanson, R.K., Harris, J.R., & Morton, K.E. (2003). Sexual offender recidivism risk. What we know and what we need to know. *Annals of New York Academy of Sciences*, 989, 154-166.

Hanson, R.K. (2004). *Predictors of Sexual Recidivism: An updated meta-analysis, 2004-02.* Canada: Public Safety and Emergency Preparedness Canada.

Hanson, R.K., Mann, R.E., & Thornton, D. (2011). Improving the predictive accuracy of Static-99 and Static-2002 with older sex offenders: Revised age weights. *Sexual Abuse: A Journal of Research and Treatment*, 22 (2), 191-217.

Hanson, R.K. & Morton-Bourgon, K.E. (2005). The characteristics of persistent sexual offenders: A meta-analysis of recidivism studies. *Journal of Consulting and Clinical Psychology*, 73 (6), 1154-1163.

Harris, A.J.R. & Tough, S. (2004). Should actuarial risk assessments be used with sex offenders who are intellectually disabled? *Journal of Applied Research in Intellectual Disabilities*, 17, 235-241.

Kimonis, E.R., Kline, S.M., Miller, C.S., Otto, R.K., Wasserman, A.L. (2012). Reliability of risk assessment measures used in sexually violent predator proceedings. *Psychological Assessment*, 1-10.

Lee, A.F.S. & Prentky, R.A. (2007). Effect of age-at-release on long term sexual re-offense rates in civilly committed sexual offenders. *Sex Abuse*, 19, 43-59.

Olver, M.E., & Wong, S.C. (2011). A comparison of static and dynamic assessment of sexual offender risk and need in a treatment context. *Criminal Justice and Behavior*, 38 (2), 113-126.

Olver, M.E., Stockdale, K.C., & Wormith, J.S. (2011). A meta-analysis of predictors of offender treatment attrition and its relationship to recidivism. *Journal of Consulting and Clinical Psychology*, 79 (1), 6-21.

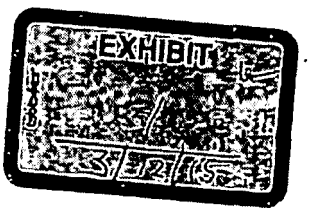
Stinson, J.D. & Becker, J.V. (2013). *Treating Sex Offenders: An Evidence-Based Manual*, The Guilford Press, New York.

Ward, T, Laws, D.R., Hudson, S. (2003). *Sexual Deviance: Issues and Controversies*, Sage Publications, California.

Nancy Connolly, Psy.D.
PO Box 9360
Boston, MA 02114
(617)566-1286
dr.nancy.connolly@comcast.net

EDUCATION

Psy.D., Massachusetts School of Professional Psychology
M.S.W., Boston College
B.A., University of Massachusetts, Amherst



QUALIFICATIONS

Licensed Psychologist
Designated Forensic Psychologist

APPOINTMENTS

Governor's Special Commission on Sexual Offender Recidivism (2014)

WORK EXPERIENCE
(POST-DOCTORAL)

2014-present *MHM Services, Inc.* *Westborough, MA*

Qualified Examiner at the Massachusetts Treatment Center. Court ordered evaluations conducted pursuant to Massachusetts General Laws Chapter 123A sections 13A and 9 regarding Sexual Dangerousness.

2011-present *MA Department of Mental Health* *Boston, MA*

Program Director for the Mental Illness/Problematic Sexual Behavior Program. Administrative and clinical oversight of statewide program. Consultation to Department of Mental Health staff and community providers, including risk assessment and risk management for MI/PSB issues. Supervision and training responsibilities.

2008-2011 *Providence VA Medical Center* *Providence, Rhode Island*

Clinical Psychologist for the Providence, RI Veteran's Administration Hospital providing evaluations and treatment of mental health issues facing American veterans. Conducted Compensation and Pension examinations to assess PTSD and mental conditions associated with military stressors. Conducted pre-employment screenings and annual fitness for duty evaluations for VA police officers. Consultant to Hyannis Vet Center mental health staff.

1999-2008 *Forensic Health Services* *Boston, MA*

Director of Adult Treatment Services for Forensic Health Services. Programs included New Mexico Women's Correctional Facility in Grants, New Mexico, Camino Nuevo Program in Albuquerque, New Mexico, Wyoming Department of Corrections Sex Offender Treatment Program, Massachusetts Treatment Center, Suffolk County House of Correction, Forensic Health Services Outpatient Management Group. Responsible for administrative and clinical programming *(2006-2008)*.

Program Director for Sex Offender Treatment Program at the Massachusetts Treatment Center and statewide facilities, including MCI-Framingham, MCI-Norfolk and NCCI-

EXHIBIT 5

Gardner. Responsible for managing and implementing all components of contract with the Department of Correction. Manager of program development and program oversight. Administrative supervisor of clinical, education, and vocational departments *(2002-2006)*.

Clinical Program Director for Boston and Southeast Area Court Clinics in 20 district courts and 5 superior courts. Administrative, clinical, and supervisory responsibilities. Liaison to Department of Mental Health and University of Massachusetts Medical Center for contractual requirements for the Court Clinics *(2000-2002)*.

Forensic Psychologist in the district courts in Southeastern Massachusetts, primarily in Falmouth and Plymouth District Court Clinics. Evaluations conducted under the provisions of M.G.L. Chapter 123 and other consultations provided to the court. Risk assessment for dangerousness and need for psychiatric hospitalization. Expert testimony provided on mental health and substance abuse issues *(1999-2002)*.

1995-1999 *Center for Health and Development* *Boston, MA*

Forensic Psychologist in the district courts in Southeastern Massachusetts and Boston area. Administrative supervisor and Team Leader. (Contract transferred to *Forensic Health Services.)*

1993-1995 *Massachusetts Treatment Center*
Department of Mental Health *Bridgewater, MA*

Psychologist in the Treatment Center for Sexually Dangerous Persons. *Chairperson* of the Restrictive Integration Review Board conducting annual reviews to determine S.D.P. status, developing treatment plans, and providing reports to the court. Administrative and clinical responsibilities including crisis assessment. Expert witness on sexual dangerousness.

1993-2013 *Private Practice/Boston Forensic Psychologists* *Boston, MA*

Consultant to Department of Mental Health for Mandatory Forensic Reviews conducting risk assessments on DMH inpatient units. *Psychologist* for Boston Forensic Psychologists specializing in evaluation, treatment, and consultation for forensic mental health issues. Psychological consultation on civil and criminal court cases.

Prior contracts: *Consultant* to Department of Correction as member of Community Access Board at the Massachusetts Treatment Center. *Independent Forensic Evaluator* for Committee for Public Counsel Services and private attorneys. *Psychologist* providing individual psychotherapy.

PSYCHOLOGY FELLOWSHIP

1991-1993 *Harvard Medical School Clinical Fellow in Psychology*
(Department of Psychiatry)
Trauma Clinic, Massachusetts General Hospital *Boston, MA*

Psychology Fellow in the Trauma Clinic specializing in the evaluation and treatment of adult victims of childhood sexual abuse and victims of acute trauma. Provided individual treatment and crisis intervention. Trained and participated in the Community Crisis Response Team. Program focused on the diagnosis and treatment of Post-Traumatic Stress Disorder.

PSYCHOLOGY INTERNSHIPS

1990-1991 *Bayview Center*
South Shore Mental Health Center *Plymouth, MA*

Psychology Intern in outpatient counseling center. Adults, adolescents, and children seen for evaluation and treatment.

1989-1990 *Bridgewater State College Counseling Center* *Bridgewater, MA*

Psychology Intern providing individual and group psychotherapy to students. Member of AIDS Task Force.

WORK EXPERIENCE (PRE-DOCTORAL)

1987-1991 *Center for Health and Development* *Boston, MA*

Clinical Forensic Social Worker in New Bedford and Wareham District Court Clinics. Responsibilities included mental health assessments for individuals facing criminal charges. Pre-trial, pre-sentencing, and probation matters addressed for adults and juveniles.

1983-1986 *McLean Hospital/Bridgewater Program* *Bridgewater, MA*

Clinical Social Worker in Law and Psychiatry Program at Bridgewater State Hospital. Emphasis on understanding and treating violent behavior. Treatment included crisis intervention and therapy with individuals, groups, and families. Administrative and supervisory responsibilities.

1982-1983 *VA Medical Center* *Jamaica Plain, MA*

Medical Social Worker involved in discharge planning for patients in medical ward, coordinating services within hospital, and family work.

1980-1982 *Department of Mental Health* *Boston, MA*

Clinical Social Worker involved in pre-trial hearings at Boston Juvenile Court, Detention Avoidance Program. Court investigator for Care and Protection petitions. Consultant to Probation Department for delinquency and CHINS matters.

COMMUNITY TRAINING AND OUTREACH

2013 Annual DMH Forensic Service Division's MI/PSB Program Training Conference
Presenter for Conference on Enhancing Community Safety and Recovery: Best Practices in MI/PSB Treatment Through Collaboration

2012 MI/PSB Program: What Community Providers Should Know
Presenter for Conference sponsored by Massachusetts Department of Mental Health, Forensic Service and University of Massachusetts Medical School, Law and Psychiatry Program

2009 Boston Institute for Psychotherapy
Presenter for 17th Annual Psychology Goes to the Movies Film Series
Series Title: Sexual Deviance and Its Vicissitudes

2005-2006	Risk Assessment of Sex Offenders, Use of Actuarial Measures and Guided Clinical Interviews, Treatment Programming Trainer and Consultant for Wyoming Department of Corrections
2005-2006	Member of Training Team for the Japan Ministry of Justice, Correction Bureau at the Massachusetts Treatment Center
2005	Risk Assessment and Risk Management of Offenders Trainer and Consultant for Bermuda Department of Corrections
2004	Victims of Violence Training Instructor for Sexual Assault Investigators at the Massachusetts State Police Training Academy
2003	Massachusetts District Attorneys Association 5th Annual Conference Presenter for annual conference: Department of Correction Massachusetts Sex Offender Treatment Program
2002	Clinical and Forensic Issues in the Assessment of Sexually Dangerous Persons Presenter for Forensic Health Services & Department of Correction conference
2001	Criminal Justice Training Council, Police Academy Instructor for continuing education program for police prosecutors in Plymouth area on Court Clinic Evaluations and Commitment Issues
2000	Substance Abuse Leadership Team Presenter for statewide program to train court employees on issues related to substance abuse Member of Substance Abuse Leadership Team in Falmouth District Court
2000-2001	Mental Health Advisory Committee, Plymouth County Correctional Facility Member of advisory committee organized to address the delivery of mental health services in the county jail
1993	Colloquium on Doctoral Research Project Presentation of research titled "Sexual Assault Victims: The Experience of Participating in the Legal System"
1992	Training on Psychological Trauma and film "PTSD: Beyond Survival" Presenter to Women's Support Services, Martha's Vineyard
1992	Training on Suicide Risk and Assessment Presenter for Trauma Clinic Continuing Education Series, Department of Social Services-Boston

teaching experience

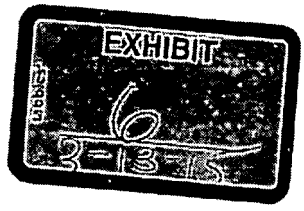
2004-2008 **University of Massachusetts-Boston**
Adjunct Professor for Psychology Department. Field supervisor for post-doctoral fellows in forensic psychology

2004 **Anna Maria College**
Adjunct Professor for Master's level class in Criminal Justice Program

Title of Course: Forensic Psychology

memberships

Association for the Treatment of Sexual Abusers, Clinical Member



ANGELA M. JOHNSON

550 Adams St. #283 Quincy, MA. 02169
781-956-7667
dr.angela.johnson@gmail.com

Massachusetts License #8751

EDUCATION

Massachusetts School of Professional Psychology, (Clinical Psychology) Psy.D., Specialty track in Forensic Psychology, 2005.

University of Phoenix, (Counseling, Marriage, Family Therapy), M.A., Sacramento, CA., 2000.

Patten College, (Liberal Arts), B.A., Oakland, CA., 1997.

LICENSURE

Licensed as a Clinical Psychologist and Health Service Provider, Commonwealth of Massachusetts, effective 2007.

PSYCHOLOGY POSITIONS

Clinical and Forensic Positions

Adjunct Professor, Roger Williams University (current)

Independent Forensic Psychologist, self-employed, 1/2014 to present.

Independent Contractor, Qualified Examiner, MHM Services-Forensic Health Services, 1/2008-present.

Independent Contractor, Community Access Board Member, Massachusetts Treatment Center, MHM Services-Forensic Health Services, 2009 to 2011; 1/2014 to present.

Psychologist IV, Community Access Board, Massachusetts Treatment Center, Department of Correction, Commonwealth of Massachusetts, 8/2011 to 12/2013.

Court Psychologist, Southeast Region, District and Superior Courts of the Commonwealth of Massachusetts, Forensic Health Services-MHM, 4/2007-11/2009.

EXHIBIT 6

Clinical Program Coordinator, Camino Nuevo Women's Correctional Center, Albuquerque, New Mexico., Forensic Health Services-MHM, 7/2006-4/2007.

Clinical Fellow in Forensic Psychology, Massachusetts Treatment Center, Forensic Health Services, 8/2005-6/2006.

PRIOR CLINICAL EXPERIENCE

Crisis Clinician, South Shore Mental Health, 2000-2006.

Pre-doctoral Intern, Middlesex County and Cambridge Court Clinic, Juvenile, Probate and District Courts, 2004-2005.

Pre-doctoral intern, Lemuel Shattuck Hospital, 2002-2004.

Practicum Student, The Home for Little Wanderers, 2001-2002.

Staff Clinician, River Oak Center for Children, Sacramento, CA. 1999-2000.

Residential Staff, Gateway Residential, Roseville, CA. 1999.

POSTDOCTURAL TRAINING

MATSA/MASOC Annual Conference, 2014, 2010 and 2006.

Department of Mental Health, MIPSB-Mentally Ill Problematic Sexual Behavior, Training and presentation, 2013.

Pedophilia and sexual offending against children: theory, assessment and intervention, American Psychological Association, Continuing Education, 2012.

Massachusetts District Attorney's Association on Sexually Dangerous Persons, 2011, 2010, 2009 and 2006.

Department of Mental Health Annual Forensic Conference, 2006 and 2007.

American Board of Forensic Psychology Seminar on Ethics, 2007, Albuquerque, NM.

University of Minnesota, Two day workshop on the MMPI-2/MMPI: use with forensic populations, 2006, Minneapolis, MN.

Department of Mental Health, Forensic Division, five day training for designated forensic professional, including specialty forensic training with adult populations, 2006.

Massachusetts School of Professional Psychology, WISC-IV Training, 2005.

Behavioral Tech, LLC. Dialectic Behavioral Therapy, 2002 and 2003.

River Oak Center for Children, Family Wrap Institute and Family based interventions, 2000, Sacramento, CA.

Certification in Sandtray therapy, 2000, Sacramento, CA..

PROFESSIONAL ORGANIZATIONS

American Psychological Association
American Psychology-Law Society
Association for the Treatment of Sexual Abusers

PUBLICATIONS AND PRESENTATIONS

Johnson, A. (2012) *Psychopathy-centered treatment in a therapeutic community.* Community Access Board in-service training, Massachusetts Treatment Center, Bridgewater, MA.

Johnson, A. (2012) *The use of the STABLE-2007 in SDP civil commitment proceedings.* Community Access Board in-service training, Massachusetts Treatment Center, Bridgewater, MA.

Johnson, A. (2012) *Review of age-related literature on sexual offending recidivism.* Community Access Board in-service training, Massachusetts Treatment Center, Bridgewater, MA.

Amadeo, A. (2007) *Stable-99Assessment and scoring.* Presentation at Veteran's Administration Hospital for pre-doctoral interns, Albuquerque, NM.

Amadeo, A. (2007) *Gender responsive substance abuse programming in correctional settings.* Presentation for Department of Mental Health, Albuquerque, NM.

Amadeo, A. (2007) *Mental illness in correctional settings.* Presentation for clinical and correctional staff at Camino Nuevo Correctional Center, Albuquerque, NM.

Amadeo, A. (2007) *Suicide Prevention.* Presentation for clinical and correctional staff at Camino Nuevo Correctional Center, Albuquerque, NM.

Amadeo, A. (2007) *Post-traumatic stress among female prisoners.* Presentation for clinical and correctional staff at Camino Nuevo Correctional Center, Albuquerque, NM.

Amadeo, A. (2006) *Dialectical Behavioral Therapy and its use with forensic populations and sexual offenders.* Presentation for clinical treatment staff at the Massachusetts Treatment Center, Bridgewater, MA.

Amadeo, A. (2006) *Conflict Resolution with DBT.* Unpublished manual, Massachusetts Treatment Center, Bridgewater, MA.

Amadeo, A. (2005) *The development of a "restoration to competence" program for patients found incompetent to stand trial.* Doctoral Dissertation, Massachusetts School of Professional Psychology, Boston, MA.

The Commonwealth of Massachusetts
Executive Office of Public Safety & Security
Department of Correction
Massachusetts Treatment Center
30 Administration Road
Bridgewater, MA 02324

Tel: (508) 279-8100
Fax: (508) 279-8105
www.mass.gov/doc

Deval L. Patrick
Governor

Andrea J. Cabral
Secretary

Carol Higgins O'Brien
Commissioner

Katherine A. Chmiel
Thomas E. Dickhaut
Paul L. DiPaolo
Deputy Commissioners

Steven J. O'Brien
Superintendent

COMMUNITY ACCESS BOARD
ANNUAL REVIEW & SECTION NINE

I. IDENTIFYING DATA:

Resident's Name: James Green	**D.O.B.:**
Commitment #: M-106022	**Date of SDP Commitment:** 7/19/11
Sentence: 8 years to 8yrs, 1 day	**Sentence Effective Date:** 6/3/02
Parole Eligibility: N/A	**Maximum Date:** 2/5/10
Status: Civil	
Date of Review: 11/20/14	**Date of Last Review:** 8/1/13
Board Members Present:	**Angela M. Johnson, Psy.D.** Anne E. Johnson, Ph.D. Ira Silverman, Ph.D. Andrea Barnes, J.D. Ph.D. Katrin Weir, Ed.D.
Staff Members Present:	Janna Douglas, MA, LSW
Observers:	Maria Salvador, Ph.D.
SDP Determination:	On this date, the Board voted unanimously (5-0) that Mr. Green remains a Sexually Dangerous Person.

EXHIBIT 7

II. CIRCUMSTANCES OF THE REVIEW:

The Community Access Board "CAB" or "Board" convened today at the Massachusetts Treatment Center (MTC) to conduct an assessment of Mr. Green's current sexual dangerousness. This included an assessment of his treatment progress, consideration of possible placement in the Community Access Program and to make treatment recommendations for future care. Mr. Green has filed a Section 9 petition with the Court in order to be released to the community.

M.G.L., Chapter 123A, Section 1 defines the Community Access Board (CAB) as:

> A board consisting of five members appointed by the commissioner of correction, whose function shall be to consider a person's placement within a community access program and conduct an annual review of a person's sexual dangerousness.

With regard to the CAB's responsibility, M.G.L., Chapter 123A, § 6A states, in part:

> The board shall also conduct annual reviews of and prepare reports on the current sexual dangerousness of all persons at the treatment center, including those whose criminal sentences have not expired. The reports shall be admissible in a hearing under section nine of this chapter.

Mr. Green is a 56 year old man who, on March 19, 2007, pled guilty to one count of Rape, and was sentenced to eight years to eight years and one day with 2179 days credited. It should be noted that regarding the same offense, Mr. Green was found guilty of Assault and Battery and sentenced to 2 ½ years in the House of Correction with 1659 days credited. A third charge of Being a Habitual Criminal was dismissed on March 19, 2007 as well.

Mr. Green has prior sexual offenses of record. On May 28, 1998, Mr. Green pled guilty to Rape and Assault to Rape, and was sentenced to five years to five years and 90 days for each conviction to run concurrently; on that same sentencing date, one count of Assault to Rape was (guilty) filed.

On August 31, 1991 Mr. Green pled guilty and was sentenced to five years for Indecent Assault and Battery; one count of Assault and Battery was (guilty) filed, and one count of Rape and one count of Kidnapping were dismissed. On that same sentencing date, Mr. Green was also given a guilty filed for Possession of Class B Substance, Cocaine.

On February 4, 1987 Mr. Green was found guilty of Rape and received a 15 year committed sentence. On that same sentencing date he was found guilty of Indecent Assault & Battery and Assault and Battery, and remanded to the House of Correction. On June 6, 1988 the judgment (on all charges) was reversed and set aside. On February 3, 1997 all charges were nol prossed as the victim was unable to testify in a 2nd trial.

M.G.L., Chapter 123A defines a Sexually Dangerous Person (SDP) as:

> Any person who has been convicted of or adjudicated as a delinquent juvenile or youthful offender by reason of a sexual offense and who suffers from a mental abnormality or personality disorder which makes the person likely to engage in sexual offenses if not confined to a secure facility.
>
> Any person who has been charged with a sexual offense and was determined to be incompetent to stand trial and who suffers from a mental abnormality or personality disorder which makes the person likely to engage in sexual offenses if not confined to a secure facility.
>
> Any person who has been previously adjudicated as such by a court of the Commonwealth and whose misconduct in sexual matters indicates a general lack of power to control his sexual impulses, as evidenced by repetitive or compulsive sexual misconduct by either violence against any victim, or aggression against any victim under the age of 16 years, and who, as a result, is likely to or otherwise inflict injury on such victims because of his uncontrolled or uncontrollable desires.

The Law defines the term "mental abnormality" as a "congenital or acquired condition of a person that affects the emotional or volitional capacity of a person in a manner that predisposes the person to the commission of a criminal sexual act to a degree that makes the person a menace to the health and safety of other persons."

A "personality disorder" is defined by Law as a "congenital or acquired physical or mental condition that results in a general lack of power to control sexual impulses."

"Likely" is defined as "reasonably to be expected in the context of the particular facts and circumstances at hand." (Commonwealth v. Boucher, 438 Mass. 274, 276-278 (2002)

This is an Annual Review of Mr. Green's treatment as prescribed by M.G.L. Chapter 123A, Section 6A. Components of the current review included assessment of Mr. Green's progress in the Sex Offender Treatment Program, any recommendations for further treatment, recommendations regarding a transition plan, and an evaluation of his SDP status. This review also serves as a M.G.L. Chapter 123A, Section 9 evaluation.

III. WARNING ON LIMITS OF CONFIDENTIALITY:

Mr. Green attended the beginning of today's meeting where he was told by Dr. Silverman the CAB was meeting for the purposes of evaluating him for his upcoming Section Nine Trial and to conduct an Annual Review. Mr. Green was told that anything he shared in the meeting would not be held confidential and that any information he provided in the course of the meeting could be included in written reports or used in oral testimony provided to the Courts. He was also informed that he had a right to refuse to participate in the meeting. In addition, Mr. Green was

informed that he could refuse to answer any specific questions posed to him during the course of the meeting. Mr. Green conveyed an understanding of the information mentioned above stating, "This is my choice to either go forward. If I go forward the information it is not confidential and [what I say] will going a report and be shared with the court. I have the right to answer some questions and not others." All CAB members agreed that Mr. Green understood the purpose of the meeting and his rights given the circumstances. Mr. Green then declined to participate further in the evaluation and left the room.

IV. SOURCES OF INFORMATION:

The current report was prepared following the most recent review. The review considered information from the resident's entire treatment record (including, but not limited to, Qualified Examiner evaluations, CAB Annual Reviews, RIRB reports, group progress notes, medical records, Department of Correction records, and Annual Treatment Reviews) at the Massachusetts Treatment Center (MTC), as well as information presented to Board members by treatment staff. The present report is intended to summarize the major findings and conclusions of the evaluation. All Board members who were seated had input into the report.

V. RELEVANT HISTORY:

As Mr. Green elected not to participate in today's meeting, the Board was left to review his records to obtain historical information. Mr. Green did participate in a March 12, 2012 Comprehensive Assessment with Heather Terkla, M.A. Therefore the following is taken from that report:

> Relevant History
>
> Mr. Green's history was obtained from his previous Intake Assessment, authored by Michele Waldron, MS on December 4, 2007, responses to questions on Clinical Interviews held on 2/15/12 and 2/22/12, and from Department of Correction records. Where information provided during Mr. Green's clinical interview is consistent with the information contained within his Intake Assessment, authored by Michele Waldron, MS on December 4, 2007, that information from that earlier report is reproduced hereunder.
>
> Developmental and Familial History
>
> The following indented material is taken verbatim from Mr. Green's Intake Assessment authored by Michele Waldren, MS dated 12/4/07:
>
> > Mr. Green reported he was born and raised in a low-middle income family in Waynesboro, Georgia by his paternal grandmother and grandfather until he was sixteen years old. He stated his parents were never married, because they were too young. His father was sixteen and his mother was

fourteen when he was born. He indicated there are conflicting stories about how he was placed into his grandmother's custody at age three or four years old. His mother reported his father took him away from her and his father reported his mother gave Mr. Green up to his grandmother. Mr. Green stated he believes both parents and further expressed that it is "their problem they can't get it together. I'm OK." Both of his parents re-entered into relationships. His father married a woman named Barbara in Boston, Massachusetts, which produced a younger half-brother, who Mr. Green remains in contact with and reports having the closest relationship with. After this relationship ended, his father entered into a relationship with a woman named Ida, which produced two half brothers. All three half-brothers are reported to be in their thirties. His mother remarried and has three girls and three boys whose ages range from forty-eight to forty-one. Mr. Green indicated he is closest with his father's side of the family and does not keep contact with his mother's side of the family. He indicated his father always knew where his mother lived in case Mr. Green wanted to contact her. He maintained sporadic contact with his mother over the years and spent one summer with her and her family in Baltimore, Maryland, but fought with his half siblings.

Mr. Green described the environment he was raise in as easy going and laid back. He reported his grandmother was a hairdresser. He stated he also lived with his two aunts and two uncles who were about five to ten years older. He reported they did not treat him very well. He indicated there were several verbal and a few physical altercations. He reported his grandmother treated him "as if he were her own child." He reported his father called one time per week to check on him. He stated his grandmother and father would describe him as a good child. Mr. Green reported he was typically punished three to four times per year, by his grandmother, who used a belt or extension cord. He stated he got into trouble for school fights or not doing school work, but denied getting into trouble at home.

Mr. Green moved to Massachusetts with his father when he was sixteen years old. He reported his father requested he live with him because his grades were decreasing. He attended a private school and lived in Mattapan, Massachusetts with his father's family. Mr. Green reported his grandmother passed away three to four years ago from "old age" and his father also passed away a few years ago from cancer.

Mr. Green reported being sexually abused on two occasions. On the first occasion, Mr. Green was five years old, his uncle exposed himself and attempted to force him to perform oral sex on him. He reported this occurred three to four times, but he never did perform oral sex and did not remember how he got out of the situation each time. He added that this

> uncle as later found out to be gay or bisexual as a means of explaining why his uncle would enlist Mr. Green to engage in oral sex.
>
> The second occasion, Mr. Green reported his aunt "tried to have sex with him" when he was five years old. He indicated she was fifteen or sixteen years old when she lay naked on a couch with her legs up. She was watching television and no one else was in the room. Mr. Green reported her behavior and lack of clothing indicated to him that she wanted to engage in sexual intercourse with him. When further questioned about his perspective of the incident he admitted, she may have just been watching television. He denied she said anything to him or made gestures.
>
> Mr. Green reported he was physically abused by his grandmother in the form of spankings or beating using belts, an extension cord, "or whatever she could get her hands on." He indicated marks were left on his body, but he was never taken to the hospital for treatment. His assertion of abuse was minimized in his questionnaire and when first addressed in the clinical interview.
>
> Mr. Green stated he witnessed violence his home, but not in the community. He reported his grandparents fought verbally and physically due to his grandfather getting drunk and spending money. He described the physical fights as his grandmother hitting his grandfather with her fists and then his grandfather walking away.

ACADEMIC HISTORY

The following indented material is taken verbatim from Mr. Green's Intake Assessment authored by Michele Waldren, MS dated 12/4/07:

> Mr. Green reported he graduated high school. He reported he liked playing sports in school and did not like when he failed a grade... when asked if he was suspended from school, he indicated he was suspended on two occasions for fighting in high school.

Mr. Green reported that he was involved in two fights growing up. He stated one fight was in fifth or sixth grade. He reported that another boy followed him home and his grandmother forced him to fight. The second fight he stated was when he was seventeen. He reported that a female, the same age or younger, threw a snowball at him. He responded by punching her in the stomach. Mr. Green stated that after he punched her he apologized.

He stated his average grade in school was a "C" and denied attending special education classes. He described his teachers as, "some were mean and some were helpful." He also reported getting into trouble at school for refusing a paddling, but did not offer details of the circumstances around this incident.

Mr. Green reported he repeated fourth and tenth grades due to his poor grades. He reported that until fifth grade, schools were segregated. He attributed being held back in fourth grade from difficulties around the integration of schools because he "wasn't used to seeing white people." He stated with segregation, he knew the boundaries, but with integration, boundaries became less clear. He also indicated he had difficulty with a math teacher who was white, but "does not want to blame her" for repeating a grade. When he moved to Massachusetts in the seventies, he attended a private school and denied the integration of schools effected him. He did state that coming to Boston was worse than his experiences with racism in Georgia, because he did not know what to expect. Such as not knowing which neighborhoods were safe for him to travel in.

MILITARY HISTORY:
The following indented material is taken verbatim from Mr. Green's Intake Assessment authored by Michele Waldren, MS dated 12/4/07:

> Mr. Green reported he was in the Army for two years and was honorably discharged. He indicated he did not like being in the Army. He reported he asked a commander to get him out due to racism he experienced by his Sargent. He stated that the Sargent would do things to humiliate him.

A Probation Pre Trial Report dated June 6, 1986 notes "...In August of 1980, the subject entered the United States Army. He was discharged honorably in March of 1982 [other reports note March 1983]. He held the rank of E-2 at the time of his discharge. He said the only award he received was the Army Service Medal. He doesn't know why he received it, but they gave it to him and he took it...received a general discharge under honorable conditions. He stated he wanted to leave the Army and was permitted to do so..."An Updated Report of a Qualified Examiner to the Court authored by Michael J. Murphy, Ed.D. (01/14/11) notes "...Mr. Green said he enlisted in the Army for four years in 1979 after graduating from high school. He said that in 1981, however, he received a General Discharge Under Honorable Conditions due to demonstrating "problems with authority." He said that he remained in the United States throughout his period of enlistment..."

Mr. Green reported that he received the Army Service Metal for being enlisted in the army. He explained that everyone receives this metal for being in the Army after a designated time. In addition, Mr. Green described his experience in the army as "alright." He explained his reason for leaving the army was he did not get along with the section sergeant and was denied a transfer to another unit.

EMPLOYMENT HISTORY:
The following indented material is taken verbatim from Mr. Green's Intake Assessment authored by Michele Waldren, MS dated 12/4/07:

> Mr. Green reported that he began working at the age of thirteen. He reported having many jobs and listed examples such as working for the recreations department, water blasting, tow truck driver, and parking attendant as a few of them.

Mr. Green reported having approximately 15 to 20 different jobs in his life. He reported his longest employment was 16 years, working for his father at a gas station. He description of past job duties included: completing Massachusetts Inspections on motor vehicles, pumping gas, and operating a tow truck. According to the Intake Assessment authored by Michelle Waldren, M.S. dated on 12/4/07, Mr. Green was fired on numerous occasions by his father due to "poor work performance such as not showing up for work." He said his shortest employment was 2 or 3 months; water-blasting. He explained he quit this job because it was too dangerous. Mr. Green described himself as a good worker who can "move up easy" and who "can do more than one job at a time." Mr. Green reported that in the past he would be under the influence of cocaine at work. He reported that cocaine made it difficult to function at "100 percent" and many times if he were "high I didn't go to work." Mr. Green reported that he got in trouble once for getting into a physical altercation with a co-worker while working for his father. He explained that the fight was over cocaine. He reported the longest he was without work while in the community was "two months or six months while in a drug program." Mr. Green reported while in the community he supported his drug habit through criminal activity. He explained that this was the reason for his numerous Breaking and Entering charges.

In terms of long term career goals, Mr. Green reported that he would eventually like to open a laundry mat. Mr. Green explained that this would require him to save money, establish credit, and find the right location. Mr. Green stated that he has not had financial difficulties in the past, except for falling behind on child support. He denied falling behind on bills, failing to pay back loans, or accumulating credit card debt.

Sexual Development
The following indented material is taken verbatim from Mr. Green's Intake Assessment authored by Michele Waldren, MS dated 12/4/07:

> Mr. Green reported he first learned about and became interested in sex at twelve or thirteen from older male friends who told him about it. He reported he grew up around older males who would tease him about sexual behaviors with other girls. He reported his first sexual contact was, "we kissed and I rubbed her vergina [sic] and that was it. Just puppy love." He stated he had intercourse for the first time when he was fifteen or sixteen.

He reported, as an adolescent, he played hide and seek with peer age girls. He would hide with certain girls and they would mutually touch each other. Mr. Green stated when he found them they would do "touchy feely stuff," such as rub or touch them.

Mr. Green reported he began masturbating at age thirteen one to two times per week. As an adult, he masturbated at the same frequency except when he was 23-25 when he masturbated three times per week. He stated this increase was attributed to gaining access to pornographic movies, which "made him sit up a little bit." He stated his fantasies typically include oral and vaginal sex and with someone who he has had sex with in the past. He reported he first viewed pornographic magazines at age 13-14 and looked at them until 2002 when he came to prison. He stated he first viewed pornographic videos from ages 16-17, which is inconsistent with his explanation of why his masturbation increased at age twenty-three. He denied viewing pornography over the Internet. In general, he stated he rarely viewed pornography as an adolescent or an adult. When he did view pornography it was typically of heterosexual sex. In the last three years he reported viewing pornographic magazines three or four times, which is in consistent with his report that he last viewed pornographic magazines before coming to prison in 2002.

Mr. Green reported he has attended strip clubs three times and has used the services of a prostitute over one hundred times. He stated on one or two occasions, someone paid him for sexual services by prostituting other women. He stated he did this for one year, which is inconsistent with his first response that he did it once or twice. He stated the woman chose to prostitute themselves and he denied giving them anything in return.

Mr. Green added that he did not feel that the number of sexual partners he has had in the past is "a lot." He explained that "It's not a lot, it's the lifestyle I had-sex with addicts and prostitutes."

Mr. Green admitted that he has peeped on people undressing or having sex without their knowledge; physically forced someone to be sexual against their will; bribed, tricked, or manipulated someone into being sexual; dressed in clothes of the opposite sex; and had sex with more than one person at a time. Mr. Green indicated the times he physically forced someone to be sexual with him were when he committed his governing and prior offenses. He explained that he tricked a prostitute into giving him services with a bag of peanuts that were crushed up and he told her it was cocaine. He dressed in clothes of the opposite sex for Halloween. He reported having sex with more than one woman while in the military when he paid prostitutes. He shared an incident when he paid for the services of a prostitute, but found out the individual was a transvestite and "cancelled

> it out." Mr. Green reported he has had five or six sexual partners and fifty-one night stands. These numbers are inconsistent with his statements above.

Mr. Green reported that currently he thinks about sex one or two times a week. He reported that his current masturbatory habits are one to two times a month.

RELATIONSHIP HISTORY
The following indented material is taken verbatim from Mr. Green's Intake Assessment authored by Michele Waldren, MS dated 12/4/07:

> Mr. Green reported he started dating at age sixteen. He stated he would go with dates to the movies or visited her at her house. He reported being in three or four relationships with all of them being important to him. He stated his longest relationship was five years and his shortest was for six months. The first relationship was with a woman named Betty when he was 16-17 to 25 years old. He reported they broke up due to him moving to Boston and carrying a long distance relationship did not work out. After he moved to Boston and while dating Betty, he met a woman named Wanda and dated from ages 17-20 when they broke up because he entered the military. After the military, he engaged in a relationship with a woman named Sheila who he dated for four years. At the same time as Sheila, he dated a woman named Marilyn. He did not report any other relationships after the age of twenty-six. He stated he lived with a partner consistently for three years. In general, he stated that his relationships ended due to both of them cheating, fights, trust issues, and falling in love with someone else. In contrast, he describes himself as, "loving, trusting, do whatever to stay together or make a relationship last." He denied ever marrying or presently being in a relationship. He stated he has one daughter who is twenty-four with a woman named Mary who he cheated on his girlfriend with by having sex with Mary for a "couple of days." He stated Mary always had custody of his daughter, but he could visit her whenever he wanted. He further indicated he paid child support when he was not incarcerated.

Mr. Green reported that he has not had contact with his daughter since his civil commitment in July 2011. He explained that he thought this might be due to "resentment." Mr. Green stated that currently his brother is trying to communicate with her.

PSYCHIATRIC AND MEDICAL HISTORY
The following indented material is taken verbatim from Mr. Green's Intake Assessment authored by Michele Waldren, MS dated 12/4/07:

> Mr. Green reported attending mental health treatment with a psychiatrist at Norwood Treatment Center from 1986-1987 after one of his prior sexual offenses. He stated he was given a psychiatric diagnosis while at the Veterans Administration Hospital on Huntington Ave in Boston, but could not remember the name of the diagnosis. He denied being hospitalized for psychological or emotional reasons. He denied suicidal and homicidal ideation in the past and present. He stated he has completed phases one and two of sex offender specific treatment while at NCCI Gardner. When asked if he felt he needed sex offender treatment, Mr. Green stated, "If there is any way, treatment or program that will help not reafend [sic] I need it and I need to take a good look my [sic] past behavior and not reafend [sic]."
>
> Mr. Green described his physical health as good. He stated he cannot eat "fat food it will make my calestaral [sic] go high." He indicated he wears glasses to read. He takes Mevacor 20 mg po daily for high cholesterol. He denied ever receiving a head injury.

SUBSTANCE USE HISTORY

The following indented material is taken verbatim from Mr. Green's Intake Assessment authored by Michele Waldren, MS dated 12/4/07:

> Mr. Green reported he first used cocaine at age twenty-seven. He typically used a half a gram per week and last used a gram on May 31, 2002. He stated he first drank wine at age thirteen and typically drank a half of a glass every six months. He reported last using in 1973. Mr. Green reported first drinking beer at age sixteen. He typically drank a quart per day and used this same amount the last time in 1976. He denied ever being charged with driving while intoxicated. He admitted to selling drugs for three or four months. He supported his cocaine habit with "normal work," "B + E's," and pan handling. He reported being in treatment for substance abuse in 1984 at Dimock Street Detox, in 1994 at Quincy Detox, and in 1996 to 1997 at Long Island Detox.

Additionally, Mr. Green reported that his longest sobriety while in the community was 1 year. During the interview, Mr. Green expressed that maintaining sobriety in the community is important for him. He stated that the day he is released from the Massachusetts Treatment Center he plans on attending an AA/NA meeting.

Criminal History

The following information regarding Mr. Green's criminal history was obtained from a Board of Probation (BOP) review and is contained within the Department of Correction's six-part record. (Note: District Court charges are not included in the table below if the charges move forward to a Jury or are bound over to Superior Court.)

Arraignment Date/Age	Charges/Offense	Disposition
Adult		
08/05/79 – 21 yo	Forgery 1st Degree (in GA)	Released/Dismissed
06/03/83 – 25 yo	Disorderly Person	Dismissed
06/13/83 – 25 yo	No Support	Speedy Trial Papers Filed Closed (in handwriting)
04/23/86 – 28 yo	Annoying Telephone Calls	Dismissed
05/21/86 – 28 yo Norfolk SC	83218 Rape	15 yrs cmtd 02/13/87 Jdgmt Revoked Verdict Set Aside 06/04/88 Nol Prossed 02/04/97
	83219 Indecent Assault & Battery	Filed 02/13/87 Nol Prossed 02/04/97
	83220 Assault & Battery	Filed 02/13/87 Nol Prossed 02/04/97
08/25/86 – 28 yo	Assault & Battery	Probation VWF
	Annoying Telephone Calls	Filed
	Threatening to Commit a Crime	Filed
01/23/90 – 31 yo	Possession Class B Controlled Substance	60 days cmtd
	Shoplifting	Filed
04/09/90 – 31 yo	Breaking & Entering DT w/int com felony	1 yr cmtd
	Breaking & Entering DT w/int com felony	2 yrs sps 1 yr o/a 1 yr ss Probation 2 yrs VOP Warrant

02/11/91 – 32 yo	Trespassing	Dismissed
05/24/91 – 33 yo Worcester SC	911284 Rape	Dismissed
	911285 Indecent Assault & Battery	5 yrs cmtd VWF 08/13/91
	911286 Assault & Battery ( )	g. Filed
	911287 Kidnapping	Dismissed
	911288 Possession of Controlled Substance (cocaine)	g. Filed
02/08/94 – 35 yo	Breaking & Entering Night	Warrant 10 mos cmtd
In relation to the charge noted above, an Application for Complaint dated February 8, 1994 notes "The above victim [Gail R.] states that on 12-14-93, about 6:00PM, the above suspect broke into her basement and stole the above listed property [Speaker $150.00]..."		
03/23/95 – 36 yo	Assault & Battery w/dangerous weapon (shodfoot)	Dismissed
	Assault & Battery w/dangerous weapon (knife)	Dismissed
06/12/95 – 37 yo	Breaking & Entering NT w/int com felony	1 yr cmtd
10/04/96 – 38 yo	Knowingly Receiving Stolen Property	Warrant x2 Filed
11/20/96 – 38 yo	Breaking & Entering Night	6 mos ss VN Warrant VOP Reprobated
12/23/96 – 38 yo	Breaking & Entering DT w/int com felony	Dismissed
	Larceny More	Dismissed
	Bribery	Dismissed
06/23/97 – 39 yo Suffolk SC	11171001 Rape	5-5 yrs + 90 days cmtd VWF 05/28/98
	11171002 Assault to Rape	5-5 yrs + 90 days cc
	11171003 Assault & Battery	g. Filed
06/03/02 – 44 yo	Larceny Less	Not Guilty

	Breaking & Entering DT w/int com felony	Not Guilty
09/16/02 – 44 yo Plymouth SC	13001 Rape	Mistrial 10/25/06 8-8 yrs + 1 day cmtd 03/19/07
	13002 Habitual Offender	Dismissed after plea 03/19/07
	13003 Assault & Battery	2½ yrs cmtd 12/18/06
Note: A warrant was issued on November 21, 2003 for Failure to Register as a Sex Offender.		
Note: The Massachusetts Registry of Motor Vehicles reflects approximately eight separate incident dates related to Mr. Green for actions/violations that include: surchargeable accident speeding, suspension court default indefinite, dpw state highway registration, hearing, expiration, nonrenew Comm. of MA, warrant, non pay child support and suspension non pay child support indefinite.		

Institutional Adjustment

Mr. Green's Department of Correction record reflects seven disciplinary reports received from previous incarcerations for violations/behaviors that include: being out of place/disobeying a direct order (09/01/92), disobeying a direct order (05/14/93), fighting (09/10/98), insolent/disobeying a direct order (05/17/01), possession of a tampered hotpot (08/15/01), receiving items of value from another (01/14/02), and possession of a pornographic magazine (01/17/02). A Classification Report dated February 19, 2002 notes "...Records indicate that while awaiting trial at the Plymouth H/C for 366 days he rec'd 9 d-reports for insolence toward a CO, before being sentenced..." While awaiting trial for his most recent offense, Mr. Green received one disciplinary report for disobeying a direct order.

To date and subsequent to civil commitment, Mr. Green has not received an Observation of Behavior Report (OBR).

Sexual Offense History

According to the Board of Probation, Mr. Green has been arraigned on four separate occasions for offenses of a sexual nature. In May of 1986, Mr. Green was arraigned out of Norfolk Superior Court for charges of Rape, Indecent Assault and Battery, and Assault and Battery. He was initially sentenced for this offense on February 13, 1987, with a sentence effective date of April 3, 1986, receiving a 15-year committed sentence for the first charge. The remaining charges were filed. Mr. Green was granted parole from this

sentence on October 26, 1987 and while on parole his sentence was overturned. All three charges were eventually nol prossed on February 4, 1997. The victim of this incident was a 23-year-old female acquaintance.

In May of 1991, Mr. Green was arraigned out of Worcester Superior Court for charges of Rape, Indecent Assault and Battery, Assault and Battery, Kidnapping, and Possession of a Controlled Substance. Mr. Green was sentenced on August 13, 1991 with a sentence effective date of February 20, 1991, receiving a 5-year committed sentence for the charge of Indecent Assault and Battery. The charges of Rape and Kidnapping were dismissed and the remaining charges were (guilty) filed. The victim of this offense was a 23-year-old female stranger. Mr. Green received a Certificate of Discharge from this sentence on October 2, 1993.

In June of 1997, Mr. Green was arraigned out of Suffolk Superior Court for charges of Rape, Assault to Rape, and Assault and Battery. Mr. Green was sentenced on May 28, 1998 with a sentence effective date of May 27, 1997, receiving an overall 5 to 5 years plus 90 days committed sentence for the first two charges. The charge of Assault and Battery was (guilty) filed. The victim of this offense, a 41-year-old female stranger, notes in her testimony that she had never met Mr. Green prior to the offense. Mr. Green received a Certificate of Release from this sentence on May 11, 2002.

On May 31, 2002, 20 days after his release from incarceration for the sexual offense noted above, Mr. Green committed his fourth sexual offense on record. He was arraigned in September of 2002 out of Plymouth Superior Court for charges of Rape, Habitual Offender, and Assault and Battery. In relation to the charge of Rape, a mistrial was initially declared on October 25, 2006; however, Mr. Green was eventually convicted and sentenced on March 19, 2007 with a sentence effective date of June 3, 2002 receiving an overall 8 to 8 years plus one day committed sentence for this event. The charge of Habitual Offender was dismissed after plea. This victim, a 30-year-old female, also notes in her testimony that she had never met Mr. Green prior to the offense.

As a state inmate, Mr. Green was first transferred to the Massachusetts Treatment Center on October 19, 2007, from MCI-Concord to participate in the Sex Offender Treatment Program (SOTP). Prior to Mr. Green's pending release from incarceration in February of 2010, the District Attorney for the County of Plymouth filed a petition for civil commitment as a Sexually Dangerous Person. An order of temporary commitment to the Massachusetts Treatment Center occurred on January 27, 2010. Probable cause for sexual dangerousness was found on April 9, 2010, and a determination of Sexually Dangerous Person resulting in a civil one-day-to-life commitment occurred on July 18, 2011.

VI. HISTORY OF SEXUAL AGGRESSION AND GOVERNING OFFENSE:

The following section is also taken verbatim from the 2012 Comprehensive Assessment:

Official Version's

Following is the Official Record's description of the inmate's Sexual Offense/s:
Please note that the full names were reported in the official version. They have been abbreviated for privacy concerns.

Metropolitan District Police – 04/03/86

Date of Offense: 04/02/86
Victim: (DOB:

"At approx. 8:30 p.m. on 4/2/86, we received a telephone call from Sgt. W., of the Blue Hills District. He told us that, detectives from the Boston PD Sexual Assault Unit, were in that station, along with a rape victim. The rape had taken place upon MDC jurisdiction.

When we arrived at the Blue Hills Station, we spoke with Dets. Marcie P. and Joseph L. of the Boston PD. They told us that on April 1, 1986, Officers from District 2, took a complaint of Rape from of [address], Mattapan. She was conveyed by ambulance to the Brigham's and Womens Hospital, the Rape Crisis Center, where she was examined and the Johnson Rape Kit was completed. She was interviewed there and again by the above Boston Detectives.

On 4/2/86, Boston PD officers responded to a fight in the Mattapan area between two black males. One of the participants told the Boston officers that the man he was fighting with was wanted for Rape. This was confirmed and the suspect was taken into custody.

On 4/2/86, the above Boston detectives discovered that the scene of the rape was actually in Milton, on M.D.C. jurisdiction. It was at this point that they responded to the Blue Hills Station, along with the victim.

At this time we interviewed the victim, , of [address], Mattapan, [telephone number], a black female. She stated that a black male, known to her only as James, an acquaintance of her brother and sister, asked her if she would like a ride to Mattapan Square. He asked if she would like to ride around the square, she consented and they did so. Then he began driving his vehicle up Blue Hills Pkwy, towards the area where the incident took place. When asked what he was doing he told her that he wanted to talk to her. He pulled the vehicle over, in a parking lot on Unquity Rd., Milton just beyond the Ulin Rink. He then began putting his arms around the victim, and she resisted him. He dropped his left hand down between the seat and the door,

there was a sound of something metallic, while doing this he told her that he had a gun in his hand and that if she didn't do as he told her that he would kill her, he is quoted as saying, "he would blow her fucken head off." He demanded that she unbutton his pants, when she didn't do so, he hit her on the head with his hand. He then pulled down his pants, and told her to "give him some head," she then did as he demanded. He did not ejaculate into her mouth. The victim was very upset and embarrassed, and it was difficult for her to talk about the attack, she began crying at this time. He then told her to give him the prescription glasses that she was wearing. He told her to take off her underpants, she took off one leg of the pantyhose that she was wearing, he then demanded that she lay down on the seat of the vehicle. He held his hand behind her back, and she believes that he was holding something in his hand, she thought it might have been the gun. He told her to put his penis into her, she refused. He said to her, "Do you want to get killed." She did it, and he had intercourse with her. He ejaculated into her. After this he told her to sit up, and turn around. He threatened her again. He told her to give him more "head," he kept threatening her, she again performed oral sex on him. She told him that doing that was making her sick, and she stopped. He told her that the problem with doing this is you never know when a chick is going to squeal. I'm going to have to kill you, he said. She stated that she thought he would kill her, she pleaded with him, that she would never say anything about what happened. She told him that she would be to ashamed to tell anybody what happened and that no one would believe her. She stated that they waited there for a long time, he asked her, "What would you do in my shoes." He then told her to take her stockings off again, and again had intercourse with her, this time he was more rougher with her than before. Much more forceful. He told her to undue her blouse, and take off her bra, he grabbed hold of her breasts. She is unsure if he ejaculated in her this time. When he decided to leave the parking lot, the vehicle wouldn't back up. He told her to get out of the car and push it, when she did she thought she would be able to run, but he got out with her. When they were able to drive from the parking lot, he locked all the doors in the car. He began telling her how smart he is. He asked if she knew his name, she said James. He told her that was not his true name, that no one knew his true name. He then dropped her off on the corner of her street. When she got into her home, she called the Harvard Comm. Health Plan, she was told to call the police at once, which she did. She then told her sister, ' and her brother what had happened. She also told her mother. An ambulance responded to her, along with the Boston PD, and she was taken to the Brigham's and Women's Hospital. She was interviewed there, and examined by a doctor.

Miss describes James as a black male, in his late twenties, very thin, about 5'10", with a mustache. He had black hair, brown eyes and he talked very fast. She stated that he was wearing a black leather jacket, black leather pants, and black boots. She said he had a belt buckle that looked like brass, possibly with a figure of a gun on it.

The vehicle is described as, silver grey color, with a Bergundy [sic] vinyl roof, dark vinyl seats, a tray on the hump on the floor. At one point the glove compartment was opened, and she thought she saw a notebook and pencil in it. There was also a cassette player in the vehicle, located close to the steering wheel.

At approx. 11:30 p.m., James C. Green III, was conveyed from District 2, Boston PD to the Blue Hills District. He was charged with Rape, Indecent A&B on a person over 14, and Assault and Battery. After being booked and informed of his rights, he was taken to an office by myself and Det. M., where he was again [read] his Miranda rights from the Metropolitan Police Interrogation Form. He stated that he understood his rights and was willing to answer questions without an attorney being present. He stated that if he was asked something he didn't want to answer, he would just stop. He stated that he had been talking with the victim's sister, before the victim had come home from work. He said that he had spoken with the victim on a previous day, the term victim was his, not ours. He said when she arrived home about 4:30-5:00 p.m., he asked her if she would like to smoke some "herb," she said she would. They got into a car that was borrowed from a friend, James A. of [address] Roxbury [telephone number]. He described the vehicle as a Plymouth Foury [sic], color silver with a Bergundy [sic] top. He stated that he smoked two "joints" while driving around with the victim. He drove to the parking lot, where he asked her if she would like to have sex, and she said she would. He told her if she wants to get me off, he would have to have head first. He said this is common now a days. He stated that she gave him some "head," he didn't ejaculate, then he had vaginal sex with her, and he did ejaculate. He stated that she performed oral sex on him only once, and had intercourse once. He stated that while in the parking lot, they smoked one joint between them. He stated that he smoked either three or four joints, between 2:00 p.m. and the time of the incident. He also stated that he drank one 12 oz. Private Stock beer. After this he said that he dropped her off. He stated that sometime later he was in a fight with a Michael E., a boy friend of the victims. He stated several times that he never used any force, that everything that he did, he did with consent. He stated that he owned no gun, and never has. He did not know why the girl would say that he raped her.

Det. M. went to the scene with the victim, and she showed him where the vehicle had been parked. A search was made of the area for any evidence, but nothing was found. We shall return there during the daylight, and have photographs taken."

Commonwealth v. James Green – Grand Jury May 1991

Date of Offense: 02/20-21/91
Victim:

"The defendant was bound over from Worcester Central District Court on the following charges: Rape, A&B, Possession Class B.

Officer S. of the Worcester Police Department and the victim . would testify that on February 21 [sic], 1991 the victim met the defendant in Worcester. The victim, a girlfriend and the defendant spent much of the night smoking cocaine in various places. Eventually the victim and the defendant went to the defendant's home at [address] in Worcester where they continued to smoke cocaine. When the coke was gone the victim would testify she started to leave. She would testify that the defendant told her she had to stay and that he eventually grabbed her. An altercation ensued in which the defendant punched the victim in the eye (photographic evidence shows bruises to her eye). He then took her clothes off and forced her to have intercourse. She then states she was forced to stay until morning (despite admitting she went to the bathroom in a common area unaccompanied). She called a friend in the morning and got a ride to her apartment where she contacted police. The defendant admits smoking cocaine all night with the victim (he provided the pipe) but denies the attack.

The above defendant was indicted by the May, 1991 Grand Jury on the following charges: Rape, A&B, Unl. Poss. Cocaine, Indecent A&B, and Kidnapping."

Worcester Police Department – Supplemental Report – 02/21/91

"The following statement was taken at the Worcester Police Department on February 21, 1991 at 11:00 A.M. from . age 23 D.O.B.] of [address].

My name is I live at [address] with Dorothy W. Yesterday about 5:00 P.M. me and Dorothy were on Main St. near the Beacon Pharmacy. We met a guy. It was the first time meeting him. He said his name was James Green. James got a cab and we got in and took him to our house on [street]. James wanted coke to get high. He and Dorothy went to go get it. I stayed in the apartment. They came back between six and seven. We smoked the cocaine. As soon as James finished smoking, he wanted more. He wanted me to come over to his place. We went to [street] to get the dope. He called a friend to come pick us up. We waited on Main St. I got cold so he called a cab from a phone booth. We went to his place on [street]. Dorothy didn't go with us. James and me smoked the dope we brought. Then about 11:00 P.M., James called Dorothy. He wanted her to come over and be with his friend. She came over in a cab. James' friend paid for it. His friend lives in the same place as James did. His name might be Jerry. James wanted Dorothy to sleep with the friend so she could get some more money for blow. She didn't want to, so we ended up taking her home in James' friend's truck.

I went back with James and his friend in the truck. We got some more smoke on Hollis St. and brought it back to James' place. Me and James smoked some more at James' place. When we finished, I said I didn't want to stay anymore. He lives in the basement. I started walking up to go out. James followed after me. He started choking me, and he dragged me back in the room. I was screaming. I bit him in the finger. He

had the door locked. Some people came to help me, but he wouldn't let them in. He was swinging at me and punching me. He punched me in the eye. He started taking off my clothes. I was still yelling and screaming. He took off his clothes. He raped me. He put his penis in my vagina. When he finished with me, he let me get up. He said I couldn't leave until morning. I fell asleep.

I woke up. It was morning. He let me get dressed. I went and called Dorothy. She came to get me in her car. She saw me coming out the door. He was standing in the door. I said I couldn't talk to her there. I got in the car. We drove to a friend of Dorothy's who lived in G.B.V. We used her phone to call the police. They took me to James house and they picked him up."

Commonwealth v. James Green – Statement of the Case – 1997

Date of Offense: 05/27/97
Victim:

"Now comes the Commonwealth and gives the Court a brief summary of the above case. This summary is not intended to show all the facts that surround this matter only what has come to the attention of the Commonwealth at the time it was written.

On 5/27/97 the victim was attacked by the defendant as she attempted to open the front door of her apartment. The defendant dragged her down a basement stairwell where he forced her to perform oral sex on him. The victim was able to break free of the defendant and crawl up the stairwell to the courtyard of the apartment complex. While in the courtyard the defendant once again attacked her. Several neighbors came to her aid and responded to screams for help. According to several of the witnesses the defendant was on top of the victim with his penis out when he was dragged off the victim by neighbors."

Boston Police Department – Incident Report – 05/27/97

"About 9:54 pm POs C., M. + V. in the BK02F unit responded to a R/C for a rape in progress in the rear of [address], Roxbury. Upon arrival POs along with the TK06 unit, POs T. + M. observed victim lying on her side with scratches to her face + bleeding from her mouth + right side of her face. POs also observed above witnesses who were detaining a suspect James Green at the scene. POs spoke to witness Carolyn B. who stated that while they were leaving their residence they heard a woman screaming for help and that she was being raped. Witnesses then observed suspect with his pants pulled down + victim with her pants down + suspect holding victim's mouth. Victim then yelled to witnesses "help me, he's raping me." Witness Carolyn B. along with Tony S. + Karen L. subdued suspect until POs arrival. Suspect then stated to witness Karen L. "the bitch owes me money + she is gonna pay one way or the other."

Victim transported to BCH by the A-10, EMT's D. + D. for further treatment.

B910, Sgt. T., V822 Det. G. + V829 Det. W. from the Sexual Assault Unit, VD54 Det. S., ID unit arrived on scene.

Suspect transported to District 2, advised of his rights + booked in the usual manner on charges of Aggravated Rape. POs observed scratch marks under suspect's right eye."

Boston Police Department – Sexual Assault Unit – 05/28/97

"...About 11:00 PM, Tuesday, May 27, 1997 Detectives G. and W. of the Sexual Assault Unit responded to the Boston Medical Center and met one [redacted] BNFS 41 yrs. d.o.b. [redacted] who reported that about 8:45 PM date, as she returned from her sister's [redacted] house and while approaching her door she was grabbed from behind by a Black male, she described as in his late 20s, NFD who grabbed her by the throat and dragged her down some rear basement stairs of the building and called her a "Bitch". He unzipped his pants and she sat down, he forced his penis inside her mouth saying "Suck it bitch or I'll kill you." This male was punching her about the face and head and he began choking her. He then pulled down the left leg of her beige slacks (she had a black leg brace on her right leg over her pants leg) and he layed on top of her and put his penis inside her vagina.

[Redacted] stated that she had been screaming "rape" and was able to pull away from her assailant and crawled up the stairs with the suspect holding onto one of her legs. [Redacted] stated that her neighbors had heard her crys [sic] for help and came out into the yard and found her laying on the ground and told her to stay on the ground until the Ambulance arrived.

As a result of the above, the BK02F unit with Officers C., M. and V. along with the TK06 Officers T. and M. responded to the scene for a "rape in progress" call and found suspect, one James Green BNM 39 yrs. d.o.b. 5'11", 145 lbs. [S.S. number], slim build, black hair, brown eyes, wearing green jacket, blue jeans and brown shoes of [address] Mattapan. He was advised of his rights, conveyed to Area B2 where booked and remanded to a cell to await court action in AM of 5/28/97.

One of the witnesses [redacted] stated that prior to the officer's arrival the suspect had said to her "That bitch owes me money and she is gonna pay one way or the other."

The victim was transported to the Boston Medical Center by the BCH Ambulance with D. and D. where she was assisted by Randy B., RN and staff and was treated and released. Photographs of the injurys [sic] to the victim's face (left cheek area lacerations; right side of face lacerations and lacerations and abrasions to both elbow and hands) were taken by Detective W.

The scene of the incident was photographed by Officer S. of the ID Unit and the victim's crutches and a pint wine bottle (from which the suspect drank) were recovered at the scene and the bottle taken into custody of Detective W. and forwarded to the Department ID unit for latent prints."

Grand Jury Testimony – June 12, 1997
[excerpts]

Sworn [victim]

"...A ...I [victim] didn't see him [Mr. Green], because it was dark down in the basement. I still don't know who he were. But my boyfriend, he knew him, but my boyfriend wasn't home at the time. But when he – when I opened up the letter to show him, he realized the name of the guy...

...He was telling me, "Bitch, you going to suck my dick," and all that. "I'm going to fuck you," and all that. So then at that point, it really frightened me...

...I was hitting him, trying to get his nails out my throat, because I couldn't even breathe. That's how hard he had me around my throat...

...All over my head, my body, my face. My lip was busted...

...Then he took his penis out and told me to – he said, "Suck it, bitch."...

...He told me to take one of my damn legs out of my pants. He seen that I had the brace on this leg. And then he went over to the other leg and he told me, "Bitch, take that pant leg off the other" – "take your leg out the other pant." And so I had – I didn't have no other choice but to do it. Because I didn't know what he was going to do to me...

...He had me leaning back on the stairs...

...then he tried to stick his vagina – his penis in me...

...And that's when I just blanked out for a minute. But then I came back to. I started back – I started fighting him...

Q ...You blacked out when he got on top of you; is that right?

A Yes, ma'am. He was on top of me when I came to...

Q ...Do you know if he was able to penetrate your vagina with his penis?

A No...

Q ...And with respect to this individual, Ms. , had you ever seen him before?

A No, ma'am. Not in my lifetime, no, ma'am...

Q ...Did he ever hold a weapon to you at all?

A No. Not that I know of, no...

...the neighbors called the police, but also surrounded the defendant so he could not leave the area until the police came..."

Brockton Police Department – Arrest Report – 05/31/02

Date of Offense: 05/31/02
Victim:

"On the above date and time I was dispatched to [address] for a disturbance. I was assisted by Officer L. and Detective C. It was reported by Witness, [Jeffrey] B. that a black male wearing dark jeans and a black shirt with white lettering had run from Porters Pass area while pulling up his pants. The witness further stated a female was screaming from Porters Pass. I went down into Porters Pass and found the Victim, . She stated a black male 5'11" tall had just raped her. She was covered in debris from the ground and was quite upset. She said she was walking along the tracks with the Defendant, James Green looking for a place to smoke some crack. The defendant lead her into the woods. While they were in the woods he lunged at her neck grabbing her and forcing him [sic] to suck his penis. He held his hand up as if to hit her. She got tired and he punched [sic] in the side of the head (there was a small scratch in the left temple area). He then stated we can be here all night. He kept grabbing her by the neck through out the assault. When the defendant heard something he told the victim to be quiet. The victim's brother Witness, . and Witness, [Richard M.] R were approaching looking for the victim. The victim heard her brothers distinctive whistle and then screamed. As Witness, M. ran to his sister she ran from the brush and said "he raped me." The defendant fled Porters Pass area pulling his pants up and was seen by Witness, B. going down the side of [address]. The defendant was caught by Officer L. at [address] and the victim ID him as her attacker. The victim said there was never any intercourse just oral sex and she refused medical treatment. The defendant was transported to the station for booking."

Brockton Police Department – Report Supplement – 2004

"On 8/19/04, this Officer (Det. C.) was requested by ADA Dan H. to assist in the aforementioned rape investigation. On 8/20/04, Det. B. located Victim Both

detectives then drove with Victim to have her show us the exact location of the offense. Victim stated that she first met the suspect at Perkins Park and they walked northerly together on North Main Street and took a right on Linden Street. The victim briefly spoke to her brother, witness on [street] and then she and the suspect continued on to Porter's Pass to smoke crack. The entrance they went into was between Auto Dynamics [address] and J.W. Lopes and Sons, Inc. [address]. They went under the railroad bridge and the suspect heard voices off in the distance so he did not want to go straight on the path. Therefore, after walking out from under the bridge, they immediately went to the left and climbed up a hill to a clearing at the top. In order to do this, they climbed over lots of debris including tires and trash. This officer would estimate that it was 20 yards to where the clearing was from after the bridge. No one else was around when they reached the clearing. Victim stated there were a pail and a cement block that day when they got to the clearing and they both sat down on the cement block. The suspect asked her if she had a pipe to smoke, and she did so she began to look for it. The suspect looked as if he was going into his pocket to get the drugs and then he lunged at her throat and she fell on her back. Victim stated that she felt like she could not breathe. Voices could be heard coming towards them. The victim knew it was her brother because of his whistle. The suspect told her to "shut up" and forced her to go into the heavy brush that was about 6 yards away. The victim could remember the suspect telling her that he had an "incredible urge" to bite her ear off. She was able to get in a few screams and the suspect started to run away. The remainder of the details were the exact same as stated in Officer L.'s report.

Det. B. and this officer were able to take digital photographs of the crime scene and turned them over to ADA H."

Grand Jury Proceeding – July 2002
[excerpts]

Sworn [victim]

"...Q He [Mr. Green] asked you for sex in return for the crack?

A No.

Q Had you ever talk[ed] about that?

A Yes. I told him I would not – I hoped that wasn't part of the deal because I wasn't into that, and he said, No, I just need the pipe.

Q You asked him if it was part of the deal that you had to have sex with him in return for the crack?

A Yeah.

Q And what did he say?

A He said, No. I just need the pipe.

Q Just so the grand jurors are clear, you've been arrested and convicted in the past of prostitution?

A Um-hum.

Q And being a common nightwalker in Brockton?

A Yes...

A ...My brother called out to me, Sis, and the guy had took me and put his – starting biting on my hands as he was choking me, and I had screamed...

...I just screamed because he was hurting me, biting my hands, and he had previously threatened to bite my ear off, so it was scary...

...he had my head against the ground as he punched me...

...I screamed again, and he got up, and I started running away towards my brother, pulling my pants up, and the guy had run the other way...

...There was no, really, rock cocaine involved. He never had any or produced any or anything. That was just something he said to get me up in there, I guess...

Q ...Were there marks from the bites that you had on your hand?

A Yeah...

Juror ...Was there any crack ever found?

Witness No..."

Jeffrey B., Sworn [witness]

"A ...I heard a woman scream, coming from the wooded area behind my house...

...Roughly, about five seconds after the scream, I saw a gentleman come running up the path area next to my house, pulling his pants up...

...He ran on the other side of my house, and he was tucked up in a corner on the side of my house.

...curled up, sitting down on the ground like in a ball...

...the first thing, he looked at me right in the eyes. Like he was just looking right through me with this glassy look, and the first thing he said was, I need rehab.

So I didn't want to deal with the guy anymore, right after he said that, so I unleashed my dog, and the dog kept him pinned down in the corner...

I walked back around to the side of the house, up on the porch, and grabbed the cordless phone and proceeded to dial 911...

...I started to walk back over to where the guy was, and he had already bolted. He ran from the dog...

...You could still see him heading up the street..."

Commonwealth of Massachusetts, Plymouth, SS
Testimony of: _____ t., and Jeffrey B. – 10/23/06
[excerpts from a 190 page document located in the Department of Correction record]

_____, Sworn [victim]

"...Q ...Did you [illegible] meet somebody down there that day [05/31/02]?

A Yeah.

Q Prior to that day did you know this person?

A No.

...He wanted to use my pipe and I said is that all because I really didn't want to do anything else. I didn't have time. And he said all he wanted to do was use my pipe, no other conditions. I said I'm not going to do you a blow job or anything else...

...I said to him to smoke real quickly, I have a pipe here, you can go in the back of the park. He said no, he wanted to go somewhere more private where nobody would be around. He doesn't like to smoke out in the street. I said okay, I know of a 'ace I'll bring you...

Q ...did you have conversation when you saw your brother on Linden Street when you were walking with the defendant?

A Yes, I told him this man wanted to use my pipe and that we were going to go down by the cut, down by the tracks...

...He was sitting and he grabbed my throat. He lunged for me and grabbed my throat and slammed me to the ground...

...He was opening my pants...

...He started unbuckling his. And I told him I had AIDS, syphilis, herpes, whatever to keep him off of me...

...He replied that he just wouldn't cum inside me...

...He unbuckled his pants and he made me orally suck him...

...he was choking me...

...He was telling me to go slower, faster, softer. I wasn't doing it right. If I didn't do it right, he's going to hurt me. He said he could keep me there all night if I didn't do it right. He told me he had an urge to bite my ear off...

Q How long did this go on for?

A About, I don't know, maybe fifteen, ten minutes....

...We heard people coming.

...Picked me up by my throat and carried me to the longer grassy area.

...told me to be quiet, not to make any noise. I told him I wouldn't...

...He laid me in the grass and choked me so I couldn't say anything. I could barely breathe. I heard my brother's whistle...

...I tried to wiggle my legs so he could hear the leaves moving around or me moving around...

...His body was pressed against the whole of my body...

...He made me suck him again still...

...I got a scream out when he relaxed his grip on my throat...

...He slammed me with his fist on the side of my temple and then got up and ran

with his pants down...

...I ran towards my brother...

...I had a pretty big bruise and headache from his punch...

Q Did you have any scratches or abrasions?

A Yeah... My legs, my back...

Q How soon after the defendant ran off did you run into Officer G.?

A About five minutes...

Q ...Did the defendant ejaculate at all during this?

A No..."

Sworn [brother/witness of victim]

"Q ...prior to that afternoon, May 31, 2002, the person that you saw your sister with, had you ever seen him before?

A A couple of times...

Q ...Can you describe for the members of the jury how she [victim] looked, describe her appearance...?

A She had a knot on her head, like a half an egg on her forehead on the side of her head, her throat was all scratched up. Her clothes were ripped, she was dirty. Her hair was all mangled and she was crying..."

Other offense history

Boston Police Incident Report – 06/11/95
B+E Nighttime

"At 20:31 hours Officers responded to radio call for a B+E (NT) in progress [address]. On arrival witnesses starting [sic] pointing down [street] where the suspect had fled. Witnesses observed suspects on two separate occasions entering the victim's apartment and removing items before police arrive. Officers observed suspects walking down [street] carrying a ladder. They were stopped by Officers, a threshold inquiry was conducted, seconds later the victim/witness arrived on the scene. He immediately identified the two men as the suspects who entered his apartment. Suspects placed under arrest then transported to B-2 police station for booking procedure. Suspect #1

[James Green] described above. Suspect #2 B/N male, 42 yrs Earl R. of [address], 5'8, 150 lbs wearing shorts, black shirt, black sandals. The ladder was returned to victim."

Boston Police Incident Report – 11/19/96
B+E Nighttime

"About 1107p P.O.s P. + S. assigned to the B104F car responded to a R/C for a B+E in progress at [address], Rox. On arrival met with Pat C. who is the construction supervisor of above location [Habitat for Humanity] which is currently being renovated. Mr. C. stated he observed 1 B/M + 1 B/F remove a piece of plywood which was covering a side window and break the window then proceeded to enter the dwelling. Officers with assistance from B103F M. + M. and a B445F B.M. made a search of the dwelling and found suspect #1 described above (James Green) and suspect #2 (Cecilia M.S.), B/N/F, 37 yrs of [address] hiding in a room on the 2nd floor. Both suspects were placed under arrest and transported to Area B-2 for booking process."

Additional information

Report of Psychiatrist – Sexually Dangerous Person Examination – 04/10/87
Robert F. Moore, M.D.

"...Mr. Green tells me she [Victim [redacted]] was entirely willing to perform all these actions and that he did not at any time have a gun or threaten her with a gun.

Mr. Green's previous record shows no sexual offenses.

...In my opinion, Mr. Green is not a Sexually Dangerous Person, and I do not recommend his commitment to the Mass. Treatment Center for observation. I base this opinion on the fact that he has been convicted of a single sexual offense."

Cutler Alcohol & Substance Abuse Program – 09/01/87
William C. Wechsler, LICSW

"This letter is to inform you that Mr. James C. Green has been attending individual counseling at Cutler Counseling Center in Norwood, Massachusetts...

During the course of treatment, Mr. Green has been open and cooperative in the discussion of his crime and the consequences of his actions. He appears to understand and accept the seriousness of the crime; however, he contends differences between his version and the victim's version of the crime. Mr. Green has also focused on his past use of alcohol and cocaine, stating his intent to avoid all substance use after his parole. He acknowledges that the use of alcohol and drugs has previously had bad affects on him, causing an escalation in aggressive behavior and getting him into trouble..."

Intake Assessment – 12/04/07
Michele Waldron, MS
Pre-Doctoral Psychology Intern

"...INMATE'S ACCOUNT OF OFFENSE

Following is Mr. Green's verbatim description of his Governing Offense:
"I took a common street walker to a spot on some train tracks and forced her to preform [sic] oral sex on me by choking her."

During the clinical interview, Mr. Green further reported that he forced her to give him a "hand job" and promised her drugs for her services, but did not have any.

When asked how he had chosen his victims, Mr. Green stated,
"I had seen her walking up and main [sic] St. [sic] and went to a location where street walkers [sic] hang out and there she was."

During the clinical interview, this evaluator asked why he chose her and Mr. Green re-stated that he did not know the other ladies and had seen the victim other nights and had spoken with her occasionally.

When asked what his victims might have been thinking and feeling during and after the offense, Mr. Green stated,
"Who or why did go [sic] to [sic] or with him to that location not nowing [sic] who he was. I could have got hurt."

When asked if there was anything he might want to tell his victim, he stated,
That iam [sic] sorry that I tricked her to a location and then assalting [sic] her."

When asked what he could have done differently to prevent the offense he said,
Me not so high that I did not think, only a way to have he [sic] proform [sic] oral sex on me."

Updated Report of a Qualified Examiner to the Court – 01/13/11
Carol G. Feldman, Ph.D., J.D.

"...Mr. Green's Version of the Governing Offense: 2011 [his 2002 Offense]

Mr. Green said,

> My version of the offenses: I got up on the 31st of May... when I got up, I ended up using drugs that day. Later on my friend left. I was like intoxicated, drinking beer, using cocaine. I was walking up and down Main Street. I had made a

> decision to walk down Main Street. I went down to the Bus Stop and saw a female I saw up and down Main Street.
>
> I asked her if she had a pipe to smoke coke. She said, 'yes.' We went to a wooded area. I forced her to perform oral sex on me; it lasted for maybe five to fifteen minutes. At some point her brother came. I got up and ran into a backyard. People saw me and they called the police.

Asked whether he grabbed her and punched her, Mr. Green said, "Yes." Then he added,

> The reason I grabbed her and punched her was that I was trying to keep her quiet; I didn't want her to scream. I knew her brother was close by. When she tried to scream, I punched her. I held my hand up to her mouth to keep her from screaming.

Asked whether he knew that he was going to sexually assault her, Mr. Green said, "Yes, I tricked her into going to the woods." He also told me that he did not ejaculate during this offense, that his erection "went away."

I then asked Mr. Green whether he was in a relationship at that time and he said, "I've had girlfriends." When asked, he said that he had never lived with a woman.

Mr. Green also told me that he had seen the victim prior to the assault, but had never spoken with her.

I then asked Mr. Green how long he was in the community, after his release from his incarceration, before he committed this offense and he said, "I got out 21 days before I committed this crime." Asked to explain, he said,

> I didn't have any treatment. When I got out, I didn't deal with no (sic) issues. It was JRI and I did the Workbook and Phase I and Phase II. They just put you in a room with another inmate. I didn't get to Phase III because I wrapped my sentence. When I got out I didn't consider myself having treatment.
>
> I went back to my father. He wasn't abusive. I didn't talk back to him. I had not self-esteem. I got back into the drug environment, prostitutes, drugs. I never had a chance to address the issues...

...Mr. Green's Version of this Offense: 2011 [his 1997 Offense]

Mr. Green told me, "I never knew her. Whatever is in the police report, I agree with it."

He told me that his erection "went away." When asked to tell me his understanding of why he offended against this victim, Mr. Green said, "Whatever it says in the police report, I agree with it."...

...Mr. Green's Version of this Offense: 2011 [his 1991 Offense]

Mr. Green told me, "She was not a girlfriend. I agree with this."

Asked why he punched her, Mr. Green said,

> I agree with it. I was drinking. I asked her if she would take care of me, sex and drugs. When she said, 'no,' I got angry and punched her. It was basically an entitlement issue: we agreed to smoke coke and have sex. I take full responsibility...

...Mr. Green's Version of this Offense: 2011 [his 1986 Offense]

I told Mr. Green that I was aware that this offense was nol prossed in 1997 and asked him whether he wanted to talk about it and he said, "No comment."...

...When asked to tell me the Triggers to his offending, Mr. Green said, "Drugs and Alcohol."

He described his High-Risk situations as "Frequently going up and down Main Street locations, smoking using drugs with women, going to areas after smoking drugs with women."

Asked about his understanding of Victim Empathy, Mr. Green said,

> I do have empathy for them because I realize that they are not sick (sic), but drug addicts like I was. I hurt them and people in their families and my family. I took advantage of them.

Asked to tell me his understanding of his Deviant Arousal, Mr. Green said, "I don't have Deviant Arousal about raping or punching someone." Asked whether he ejaculated during any of the offenses, he said, "In one offense; I think it was [redacted] in 1991." Asked whether he was able to maintain an erection in the other offenses, he said, "Yes, I was."

...Mr. Green has a history of being charged with sexual offenses, from 1986 until 2002. The offenses involved violent rapes of adult women, most of whom were known to him. It appears as though the victim in the 1997 offense was a stranger. Two of the offense which resulted in convictions and one offense which eventually was nol-prossed

involved drug use on the part of both Mr. Green and the victim. There was no indication that the 1997 offense involved the use of either drugs or alcohol; the victim in that offense had a brace on one of her legs and used crutches. Mr. Green used threats against and physically beat all of his, vulnerable, victims to gain compliance...

...It is my opinion that Mr. Green is a Sexually Dangerous Person as statutorily defined who is likely to reoffend sexually if he is released at this time. Mr. Green requires the strict security of the Massachusetts Treatment Center for care and treatment...

...During this interview Mr. Green presented as evasive and manipulative: He was unwilling to explain his understanding of why he offended, repeatedly telling me after he was asked, "I agree with the police report."

And, despite the fact that he dropped out of treatment and now views his discussions with two residents of the Treatment Center, one newly re-committed and one awaiting trial, as substitutes for treatment, he states that he will access treatment in the community if he is released.

Additionally [sic] mention should also be made of the fact that Mr. Green places blame for his having committed the Governing Sexual Offense, 21 days after he was released from incarceration on his not having had a sufficient amount of treatment..."

Updated Report of a Qualified Examiner to the Court – 01/14/11
Michael J. Murphy, Ed.D.

"...Resident's Version of Sexual Offense History:

When interviewed on 01-05-11 Mr. Green provided his current understanding of his history of sexual offending.

He initially stated that he agrees with the victims' versions of the assaults as contained in official reports.

When asked to specifically discuss his assault against in 2002 he acknowledged that he had forced her to perform oral sex. He said that he had left his father's home to live with his brother, but then had relapsed to drug abuse and was subsequently homeless and staying at a shelter in Brockton. He said that he saw the victim at a bus stop and asked her if she had a pipe with which to smoke cocaine, and asked her to use drugs with him. He said that he did not in fact have any drugs but used this ruse to lure her to a wooded area near some train tracks where he grabbed her by the throat and threatened her in the course of forcing her to perform oral sex on him. He said that her brother then approached and the victim screamed as he attempted to cover her mouth. He said that he quickly pulled up his pants and ran away but was detained and soon apprehended.

With regard to his 1996 sexual offense against a female he knew as he said that he saw a woman walking on Bay Hill and approached her and asked her if she "did drugs." He said that they then went to the woman's apartment, where he forced the woman to perform oral sex on him. He said that he agrees with official versions of details of this assault.

With regard to his sexual assault in 1991 in Worcester against he said "It was the same pattern." He said he met the victim on Main Street in Worcester and raped her vaginally. He said he agrees with official versions of this assault.

He said that in two of his assaults in (1996 and 1991) it was his understanding that the women had agreed to perform sexual acts in return for drugs, but after receiving the drugs refused to engage in sexual behavior. He said, "I was feeling I was more entitled because they said they'd do certain things. Then they just wanted to leave so I got angry."

With regard to the sexual offense of which he was convicted but was later overturned Mr. Green said, "I don't have to say anything." He then denied assaulting the victim in this case...

...Mr. Green when interviewed discussed the degree of planning involved in his assaults. He said that in two of his assaults he felt that he had given the victims drugs and expected sexual contact as a form of payment for drugs. In one case he acknowledged he had no drugs but lured the victim to an isolated area with the promise of drugs and then violently sexually assaulted her. He stated that at the time he felt "entitled" to the sexual submission of the victims. He demonstrated little awareness of the role of violence in his assaults or the effect of fear and intimidation on his victims. When asked to discuss his plans to prevent himself from sexually re-offending in the future Mr. Green said that he plans to use "interventions," with his primary intervention being "thinking about coming back to this place (the Treatment Center) for the rest of my life – that's a big intervention."...

...Upon interview and re-evaluation, it continues to be my opinion that Mr. Green is likely to sexually re-offend by virtue of his personality disorder if released to the community at this time. Though Mr. Green is currently at an age at which the compulsion toward violent sexual offending may be thought to decrease, Mr. Green's relatively recent history of violent sexual assault against a vulnerable victim while in his forties indicates that the sexual nature of his antisocial impulses continues to endure. Further potential protective factors such as significant participation in core elements of sex offender treatment or a demonstrated capacity to maintain sobriety in the community are not present in Mr. Green's case. In addition, it is my understanding that

he will not be subject to the conditions of probation or parole, which, were it present, would provide a degree of protection by ensuring to the extent possible that he would maintain sobriety in the community. It is my opinion that Mr. Green requires further participation in sex offender treatment in order to reduce his level of risk of re-offending.

For the above reasons, it continues to be my opinion following interview and re-evaluation that Mr. Green has a personality disorder by virtue of which he is likely to sexually re-offend if released to the community at this time, and I would therefore continue to recommend that he be determined to be a Sexually Dangerous Person pursuant to M.G.L. Ch. 123A, S.1."

CURRENT ACCOUNT OF GOVERNING OFFENSE: The following is Mr. Green's verbatim description of his Governing Offense:

Mr. Green did not want to provide a description of his governing offense. Mr. Green stated that "I take responsibility for my actions," followed by "I take the Lamb Warning."

Mr. Green had similar responses to questions about the 1986 charges of Rape, Indecent Assault and Battery, 1991 charges of Rape, Indecent Assault and Battery, Kidnapping, and his 1997 charges of Rape, Assault to Rape, and Assault and Battery.

Late in the week Mr. Green's group facilitators questioned him about his reluctance to participate in parts of the assessment. Mr. Green expressed that he was worried that the information he might have provided in regards to his offending might have been "dissected," something he believes has happened in the past. He went on to state that he "takes full responsibility" for his offending. He explained that he "crossed the line" when he felt entitled to receive sexual acts in return for drugs that he provided to "prostitutes, street walkers." He went on to state that in the past when he provided staff with his understanding of why he engaged in past behaviors, he was told that he was not taking responsibility. He reasoned that is why he is now taking "full responsibility." Mr. Green elaborated that he understands that in the past he acted out because he felt entitled.

When asked why he treatment was important to him, Mr. Green stated that it is important to him because it allows him to "deal with issues" that will "prevent me from offending."

VII. TREATMENT HISTORY AND PROGRESS:

A summary of Mr. Green's prior incarcerations, institutional history, and experiences in treatment prior to his current civil commitment is found in the January 14, 2011 report of Qualified Examiner Michael Murphy, Ed.D. and is quoted below:

Incarceration and Treatment History:

The following incarceration history is taken from the DOC Classification Report dated 06-04-09:

Prior Incarceration Summary

On 5/31/02, Brockton Police arrested subject after he was implicated in a rape. He was arraigned the same day in Brockton DC And Charged with Rape, B&E DT, Larceny Less and A&B. On 9/16/02, the case was bound over to Plymouth SC. Subject was held at the Plymouth County HOC to await trial throughout the judicial process. Subject received one minor D- report during this time for disobeying an order. He would eventually accumulate 2179 days jail credit. Subject spent most of the time on awaiting trial status in protective custody. On 12/18/06, subject was sentenced for the A&B charge receiving 2.5 years. This would be deemed served upon sentencing. On 10/25/06, subject case would be mistrialed [sic]. A verdict would be reached on 3/19/07, and subject was sentenced to 8-8 years 1 day for Rape. The Habitual Offender charge was dismissed. He was transferred to the MTC on 10/19/07.

Prior State Incarcerations

1. 05/28/98: subject was sentenced on 05/28/98 5-5 years 90 days for Rape and Assault to Rape. During his incarceration, subject received 3 D. reports, one of which was for fighting (9/10/98). Subject participated in the SOTP and maintained employment, but was otherwise program incompliant. Subject received his COR on 5/11/02 from NCCI Gardner. No RTHC's on record.

2. 08/13/91: subject was sentenced to five years for Indecent A & B. on Person over 14. He was released on a COD on 10/2/93 from NCCI Gardner. He received 1D report for being out of place. Records indicate no returns to higher custody.

3. 02/13/87: subject was sentenced to 15 years for Rape. Subsequent to his stay at MCI Concord, subject transferred to MCI Norfolk Prerelease Center. He received no D-reports. Subject paroled on 10/26/87. There is no record via MCI Concord Parole Department of his parole discharge date.

On 04-10-87 Mr. Green was evaluated by Dr. Robert Moore with regard to his sexual dangerousness pursuant to the SDP statute at that time. Based on the fact that at that time Mr. Green had been convicted of a single sexual offense Dr. Moore concluded that Mr. Green "is not a Sexually Dangerous Person, and I do not recommend his commitment to the Mass. Treatment Center for observation."

According to records, Mr. Green participated in treatment at Cutler Counseling in Norwood, MA in 1987. According to their treatment letter:

> This letter is to inform you that Mr. James C Green has been attending individual counseling at Cutler Counseling Center in Norwood Massachusetts...
>
> During the course of treatment, Mr. Green has been open and cooperative in the discussion of his crime and the consequences of his actions. He appears to understand and accept the seriousness of the crime; however, he contends differences between his version and the victim's version of the crime. Mr. Green has also focused on his past use of alcohol and cocaine, stating his intent to avoid all substance abuse after his parole. He acknowledges that the use of alcohol and drugs has previously had bad effects on him, causing an escalation in aggressive behavior and getting him into trouble...

A 06-04-09 Classification Report describes Mr. Green's recent history of incarceration:

> ... He is currently requesting to remain at the MTC to continue in sex offender treatment. The Treatment Status Report indicates that he is currently attending and participating in class. He has read two of three offending pieces and it is recommended he remain in Pretreatment. At this time he is not involved in any other programs, he is employed as a unit worker on S-2. There are no d-reports to date. All any information verified; no enemies noted or claimed...

According to available records Mr. Green completed the two initial phases of the SOTP. 2009 SOTP records state that at that time "Mr. Green is currently attending and participating in class. He has read 2 of 3 offending pieces. The Treatment Team recommends that Mr. Green remain in Pre-Treatment." A Group Progress Note dated 11-03-09 states that "Mr. Green was motivated to excel in his work. He was open to questions and responsive to feedback." However, a progress note dated 11-24-09 states that Mr. Green "displayed a fair amount of entitlement in response to some of the here and now issues addressed."

Additionally, as noted in the January 13, 2011 report of Qualified Examiner Carol G. Feldman, Ph.D., J.D.:

> According to the records, Mr. Green has completed Phases I and II of the sex offender treatment program while he was incarcerated at NCCI Gardner.; he completed Phase I on October 29, 2001 and completed Phase II on March 11, 2002. He completed the Workbook on February 15, 2008. He completed the Basic Concepts class on May 23, 2008. In addition, he completed the Clinical Transitioning course on September 25, 2009.

According to the Forensic Health Services, Inc. Sex Offender Treatment and Parole Status Report, dated May 7, 2009:

> Mr. Green entered Pre-Treatment at the MTC on October 19, 2007.
>
> Mr. Green is currently attending and participating in class. He has read two of three offending pieces. The Treatment Team recommends that Mr. Green remain in Pre-Treatment.

According to the Group Note, dated 1/5/10:

> Mr. Green completed his Governing Offense packet.

Mr. Green was civilly committed on July 19, 2011. The first Community Access Board Annual Review, dated July 24, 2012, and authored by Matt Zaitchik, Ph.D., summarized his treatment progress[1].

Regarding Mr. Green's history of treatment at the TC, according to the 2012 Annual Treatment Review (ATR) authored by his treatment team:

> Mr. Green is currently involved in the A1A Motivation and Engagement Group facilitated by Angela Orlandi, MA. Mr. Green recently resumed treatment on July 9, 2012 after a 60-day suspension due to a physical altercation that took place with his former roommate. Prior to his suspension, Mr. Green regularly attended and was a meaningful group member that presented as engaged and motivated by accepting and providing feedback, remaining attentive, and offering personally relevant information. He is asked to continue to work in his current group by maintaining his previous level of motivation and engagement...
>
> Mr. Green has participated in and completed all aspects of a Comprehensive Evaluation. He is recommended to participate in a phallometric assessment. When asked during the Annual Review Meeting on July 9, 2012, if he would be willing to participate, Mr. Green reported that he would speak to his attorney before making a decision.

Regarding his institutional behavior:

> Mr. Green received one Observation of Behavior Report during this review period for "conduct which disrupts or interferes with the security or orderly running of the institution" and "fighting with another person." Mr. Green pled guilty to this OBR dated April 24, 2012. This report indicated Mr. Green informed the Unit Officer during the 12:00 am count that he and his cellmate got in a "fight."
>
> For these behaviors, Mr. Green was suspended from treatment for a period of 60 days and recently re-engaged in treatment on July 9, 2012. In addition to his suspension, Mr. Green was placed on an Individual Behavior Plan to address the

[1] This author sat on this CAB Annual Review.

> behaviors that led to his suspension, as well as additional treatment targets. As part of the Individual Behavior Plan, Mr. Green has been asked to take responsibility and hold himself accountable for his past behaviors by addressing his behaviors to his group and community.

His treatment team summarized:

> As Mr. Green has recently participated and completed his Comprehensive Evaluation, he is asked to work on the recommendations identified in his Individual Behavior Plan dated July 9, 2012 prior to discussing a transition to a Therapeutic Community. It will be important for him to collaborate with Treatment Staff in order to develop an understanding of specific treatment areas to focus on in order to further progress in his treatment development. He is encouraged to participate in a phallometric assessment and any behavior recommendations that may be suggested based upon the results. Additionally, he is asked to participate in the identified psycho-educational classes and integrate the material into his daily interactions. Once Mr. Green has made progress in the identified areas of treatment, he is encouraged to work collaboratively with treatment staff in the development of an individualized treatment plan.

Mr. Green's Medical Record was not available for review at the time of this Annual Review. The Board is not aware of any significant medical or psychiatric issues at this time.

The Board met with treatment team member Angela Orlandi , M.A., on 7/24/12. She noted that Mr. Green received the OBR for which he was suspended from the treatment program for "fighting with his roommate ... gave him a black eye ... this was likely a racial issue as well ... the roommate was suspended, too. His suspension is up and he'll be moving back to A-1 Unit today. Eventually he'll move to a therapeutic community. He has an individual behavioral plan. If he follows the plan he can apply for the therapeutic community ... within 60 days." Overall, "he's technically at the beginning of treatment, but he's more advanced in treatment than others on his unit."

Dr. Zaitchik authored the August 1, 2013 CAB Annual Review as well[2]. The report noted:

> According to the 2013 Annual Treatment Review (ATR) authored by his Treatment Team:
>
> > At the beginning of this review period, Mr. Green resumed treatment on one of the Assessment and Treatment Preparation Unit (ATPU) after a 60-day suspension due to a physical altercation that took place with his former roommate. He processed the issue within primary group and acknowledged that he did not

[2] This author sat on this CAB Annual Review.

follow the recommendations of his support people regarding how to address the issue with his roommate. Mr. Green took responsibility with his group and community for his role in the altercation. After processing the physical altercation and making significant progress on the Individual Behavioral Plan he received, he was approved for placement in a therapeutic community. Mr. Green transitioned to the B2 therapeutic community on September 26, 2012.

Since transitioning to B2, Mr. Green has been fairly active in the community. He created a support team, regularly attends community meetings, and serves on three support teams for fellow community members. Mr. Green has also been an active member of the B7 primary group. He regularly attends group sessions, shares here and now issues, and offers feedback to group members. Mr. Green's feedback is usually thoughtful and appropriately challenging, such as challenging group members when he perceived they were not discussing important treatment issues. Mr. Green has also been proactive about discussing his Comprehensive Evaluation and his dynamic risk factors. For much of the review period, Mr. Green focused on discussing his sexual offenses and exploring the risk factors of hostility toward women and lack of concern for others. He also focused on improving his ability to restructure negative or distorted thoughts. In doing so, he discussed assignments from the Cognitive Restructuring psycho-educational class and processed situations that demonstrated his ability to intervene on negative thoughts and improve his anger management. In addition, Mr. Green shared personally relevant information about his childhood, including his victimization as a child and how this impacted his sexual preoccupation and concern for others. He explored the origins of his hostility toward women, discussed early experiences of aggression toward women, and how his distortions about women and deviant interest in prostitutes led to using manipulation and violence in his sexual offenses. In addition, Mr. Green explored how his suspension of concern for others contributed to his offending and the physical altercation that occurred while residing on the ATPU, and briefly discussed how his brother is a significant influence in his life.

Mr. Green has been proactive about discussing his risk factors and current treatment targets, but often approaches such discussions in a concrete manner. When asked to explore something further in the moment, Mr. Green often states that he would like to think about the question or topic further and return to it at a later time. He received feedback about the therapeutic value of processing questions within group, and stated that he prefers to process questions outside of group because he does not want to "ramble with wrong answers" or say anything that could be documented in a way that would have a negative impact on him. In addition, Mr. Green's discussions often occur at an intellectual level, rather than with emotional depth. Overall, Mr. Green presents as motivated to progress in treatment and address recommendations, but it is unclear what his level of internal motivation is for treatment.

During the annual review meeting, Mr. Green stated that he believed the year had gone "good." He said that he has been participating in group and unit meetings, going to classes, processing his anger, and exploring hostility toward women, his aggression, and his social supports within primary group. He stated that his goals for the next year include "staying positive," continuing to attend psycho-educational classes and progress through the Pathways classes, remain OBR free, and follow any recommendations from the treatment team.

Regarding his institutional behavior:

Mr. Green has not received an OBR since April 24, 2012 while residing on the ATPU. He was suspended from treatment and received an Individual Behavioral Plan for engaging in a physical altercation with his roommate. Since transitioning to a therapeutic community, Mr. Green has not been a disciplinary concern. He has discussed a few interpersonal difficulties, specifically with his cellmate on B2, but asked for advice from his group regarding how to address the issue before it escalated and had a "sit down" meeting with his cellmate to discuss their difficulties. This suggests that Mr. Green is utilizing better problem solving skills to deal with interpersonal issues, but he should explore why he continues to have interpersonal issues with cellmates. He is otherwise observed to interact appropriately with community members and staff.

His Treatment Team summarized:

Mr. Green is a 55-year-old African American male who was civilly committed on July 18, 2011 following his conviction for one count of Rape. He has several prior offenses against adult women. Mr. Green currently resides on the B2 therapeutic community where he is actively engaged in several aspects of the treatment program, including primary group, psycho-educational courses, and community meetings and activities. He presents as engaged and motivated to progress in treatment. Over the review period he has been proactive about discussing his dynamic risk factors and treatment recommendations from his Comprehensive Evaluation, with specific focus on exploring the factors of hostility toward women and lack of concern for others. Although Mr. Green appears to be developing insight into the role these factors played in his sexual offenses, he tends to discuss these topics in a concrete, intellectual manner and appears hesitant to answer questions that he has not previously processed. Mr. Green may benefit from approaching his exploration of these topics in a more spontaneous and unstructured manner.

Mr. Green has also shown growth in the areas of problem solving and negative emotionality. He has demonstrated improved problem solving skills by seeking support from his group and community members to address interpersonal difficulties in a prosocial manner and avoid engaging in any physical aggression, as occurred while he was residing on the ATPU. He has also worked on

intervening on negative automatic thoughts which previously fueled his anger and hostility. Although he has improved his ability to utilize effective problem solve skills to resolve interpersonal issues, he should continue to explore the pattern of interpersonal difficulties he has had with fellow residents. In addition, Mr. Green has begun to discuss the details of some of his sexual offenses and how his dynamic risk factors contributed to his offending. He should discuss the details of his additional offenses and continue to explore the patterns present throughout his offenses. With this, he is encouraged to thoroughly explore the role of deviant sexual interests and sexual preoccupation in all of his offenses. Lastly, Mr. Green is encouraged to address any additional recommendations made by the CAB.

A review of Mr. Green's Medical Record reflects that he has not had contact with Mental Health staff at HSU since 7/18/11. He has not been given a psychiatric diagnosis and is not currently prescribed any psychotropic medications.

The Board met with Treatment Team members Janna Douglas, M.A. and Leslie Woods, M.A., on 8/1/13. They noted that Mr. Green is "doing pretty well" in treatment ... "he gives good feedback and he works on his own issues, but at times it seems superficial. He is willing to do the work but he needs to go deeper." Regarding undergoing a PPG, "It's not currently on his list of things to do, but it's not out of the question." Regarding the fact that he punched his victims, "He says he wasn't aroused to punching them ... He hasn't talked a lot about the violence in his offenses except to say that he was not aroused by it." Regarding taking the Substance Abuse psychoeducational class, "He's willing to do it, but he hasn't taken it yet."

The most recent report of Mr. Green's progress in treatment to date is taken from the July 10, 2014 Annual Treatment Review authored by his therapists.

Mr. Green remained an active participant in treatment as evidenced by his consistent attendance in primary group, community meetings, and psycho-educational classes. He appears motivated to participate in treatment and address his identified treatment goals, although his motivation can appear external in nature at times (i.e. to have progress documented). Mr. Green is typically an active participant in his primary group and regularly discusses individual treatment issues. He has brought topics to the group to elicit feedback about how he should resolve an issue and is generally receptive to their feedback. In addition, Mr. Green offers thoughtful and challenging feedback to his peers.

Throughout the review period, Mr. Green has discussed topics such as his relationships with family members in the community, interactions with peers on the unit, and discussions of the Pathways to Offending material. He has been proactive about discussing his dynamic risk factors, although he needs to continue exploring each factor in more depth. He touched on the risk factors of impulsivity, significant social influences, capacity for relationship stability, and the sexual self-regulation risk factors. He has also discussed his offending on multiple occasions, which included exploration of the patterns

present between his offenses, the role of sexual preoccupation and deviant sexual interests in his offending, and the correlation between drug use and offending behaviors.

Mr. Green has also been forthright about discussing interpersonal conflicts he has had with community members and processing his role in the situations. Mr. Green and another group member discussed their interpersonal difficulties on a few occasions, as they had difficulty working together in the group based on previous negative interactions. The two were able to process the situation, and eventually showed improvement in their ability to communicate and co-exist within the group. After a few problematic interactions with peers, Mr. Green received an Individualized Behavioral Plan in March, 2013. The IBP stated:

> "Mr. Green is a member of the B2 Therapeutic Community (TC). Recently, he has evidenced difficulties in his interpersonal relationships and effective communication. In addition, concerns have been raised that Mr. Green is overly focused on others' behaviors and has misused the accountability system. Mr. Green has had to sign waivers with two community members in recent weeks as a result of conflicts, and in both instances he was reported to have made sexualized or aggressive comments. When processing these issues in primary group, Mr. Green reported that the comments were made in attempts to hold those individuals accountable for problematic behaviors he witnessed."

The plan was designed to help Mr. Green examine and take full responsibility for his role in interpersonal conflicts and to identify ways to more effectively communicate and hold others accountable. Mr. Green was proactive about discussing the plan in primary group. He explored how his focus on others' behaviors was connected to being hyper vigilant when he lived in the community and he discussed how he sometimes has difficulty being direct when confronting peers. While on the plan, Mr. Green showed a reduction in interpersonal conflicts and reported that he was trying to use more direct and appropriate skills when communicating with peers. Mr. Green completed the IBP in May 2014.

Based on Mr. Green's 2013 Annual Review and his March 2014 Individualized Behavioral Plan, the treatment team outlined the following treatment goals for Mr. Green:

1. Mr. Green should discuss the details of his offenses and continue to explore the patterns present throughout his offenses.
    a. He is encouraged to thoroughly explore the role of deviant sexual interests and sexual preoccupation in all of his offenses.

Progress: Mr. Green discussed his offending on several occasions throughout the review period. He explored the patterns present between his offending, which included him using drugs, seeking out women who were vulnerable and could be manipulated (mainly prostitutes), and becoming violent towards the victims when they would try to use his drugs and leave before having sex with him. He reported that his anger was triggered when he felt "tricked" by the victims. Mr. Green also explored how sexual preoccupation

contributed to his offending because he was focused on meeting his sexual needs through masturbation, pornography, or prostitutes and objectified and sexualized women.

Mr. Green engaged in a discussion regarding his pathway to offending, and believed that he followed an approach-automatic pathway in his first two offenses because he did not originally intend to sexually offend, but responded aggressively when the victims did not do as he wanted. He reported that his governing offense involved more planning and active strategies because he intended to sexually offend. Mr. Green has acknowledged a deviant interest in prostitutes, and explored how this was problematic because he did not respect them and viewed them as objects. Recently, Mr. Green engaged in a discussion about current fantasies and reported that he typically fantasizes about past sexual encounters, but does consider them deviant because there is consent and no violence. He reported that he fantasizes about the sexual act only, and was encouraged to consider whether it could be problematic given his history of sexualizing and objectifying women for his sexual needs.

2. Mr. Green will work on improving his communication with peers.
    a. Mr. Green will fully explore his role in recent interpersonal conflicts and his use of aggressive statements towards peers.
    b. He should identify ways to provide feedback and hold others accountable in an appropriate, direct manner.

Progress: While processing his Individualized Behavioral Plan in group, Mr. Green explored why he presents as overly focused on others' behaviors. He reported that he seems focused on others' behaviors because he has been "hyper vigilant" his whole life due to the rough neighborhoods he grew up in. He discussed how his hyper vigilance manifests today as him always being aware of his surroundings and when people are close to him. He acknowledged that his behavior has caused issues at times when some individuals perceived that he was staring at them or monitoring their behavior, which results in interpersonal conflicts. Mr. Green has discussed ways he is trying to change his behavior so it is not perceived negatively by others, such as changing where he walks or not looking at others for too long now that he knows his behavior affects them.

Mr. Green also discussed how he can come across as aggressive when he gives feedback or holds people accountable, and acknowledged that there are times when he has been demanding or told people they should or should not do something. He explored how this is connected to his expectations of how others should act and his frustration or irritation when they do not meet his expectations. He identified an intervention of talking to his support team before approaching someone. Mr. Green has reported that his ability to communicate with his peers in a direct and appropriate manner has improved, and discussed a few recent situations where he practiced having patience and reminding himself not to put certain expectations on people. He acknowledged that it can be difficult because he "likes power and control." Since the behaviors were brought to his attention and he explored them in primary group, his relationships seem to have improved

and community members have given him feedback about his improved communication and decreased interpersonal conflicts.

3. Mr. Green will discuss his use of sexualized comments and how this is connected to the risk factors of sexual preoccupation and deviant sexual interests.

   Progress: During the review period, Mr. Green was involved in a situation in which he approached two community members and made a sexual gesture with his hand to express that he believed something inappropriate was occurring between them. The incident was reported to security staff. When discussing the situation in group, Mr. Green acknowledged that he made the gesture, but denied that there was any sexual motivation or intent to "proposition" the others involved, as was reported by them. Mr. Green claimed that he was attempting to hold the community members accountable in an indirect manner. He reported that he had tried to hold the individuals accountable before, but they did not take responsibility. Mr. Green acknowledged that his ability to communicate is affected when he feels frustrated and angry. He denied that there was any sexual intent or connection to sexual preoccupation, but stated that he understood how his comments can be perceived differently than he intends when he is not direct.

4. Mr. Green will refrain from receiving any clinically significant OBRs for the duration of this Individual Behavior Plan. In addition, he will take full responsibility for any negative behaviors he engages in.

   Progress: Mr. Green did not receive any OBRs while he was on the IBP. He took responsibility on a few occasions during community meetings for negative interactions with peers, and elicited feedback from the community regarding how he could change the way he communicates with others.

Regarding the goals set out by last year's CAB, Mr. Green did not complete a phallometric assessment; however he did request to be placed on the waiting list. He did not receive any disciplinary reports nor was he suspended during the review period. As noted above, Mr. Green was placed on an IBP to address interpersonal conflicts and poor communication, which he successfully completed in May 2014. The ATR noted that Mr. Green completed Understanding Pathways to Offending II, III, and IV, and enrolled in Understanding Empathy. He also consistently attended Alcoholics Anonymous meetings.

In summary the team reported:

> Mr. Green has been actively engaged in the treatment process throughout this review period. Despite some interpersonal conflicts and communication difficulties, Mr. Green has shown forward progress on his problem solving and effective communication. During the next review period, he should focus on the risk factors of deviant sexual interests, negative emotionality, and lack of concern for others. Mr. Green should continue discussing deviant sexual interests by more thoroughly exploring his pattern of deviancy

and how it developed. Mr. Green should also continue addressing negative emotionality. He is encouraged to explore and discuss his history of violence and aggression, and be open about the negative thought patterns he has today. In addition, Mr. Green should address the risk factor of lack of concern for others. With this, he should continue discussing his pattern of interpersonal difficulties, his ability to empathize with his victims and the experiences of others, and explore how his tendency to be emotionally distant in relationships connects to his concern for others.

A member of Mr. Green's treatment team came to today's meeting with the CAB. The team member reiterated the behaviors that had led to Mr. Green being placed on an IBP, including making a sexualized hand gesture to a resident he thought was "acting out sexually," and his misuse of the unit accountability system. The team member said that Mr. Green is observed at times to be "staring" at people, and he is overly concerned with the behavior of others. He justifies this intensity by saying "I'm held accountable; you should be too," but he is often inappropriate in his approach. The team member said that sometimes Mr. Green is perceived as being aggressive, although he is working on that. He is trying to watch his interpretations of interactions where he jumps to conclusions about others.

The team member said that one of Mr. Green's difficulties is that he can be very rigid about even small matters, for example, he feels it is "not okay to do a load of wash with only one pair of jeans." This is based on his own upbringing and experience. However, he will sometimes inflict this viewpoint on others on the unit leading to interpersonal conflicts. The team member said that while Mr. Green is working on problem solving his approach is concrete. For example, he feels as if he talks about a particular risk factor in group one time it is "done." He struggles with seeing the value in a deeper exploration of these topics. When he does try to discuss a matter in a more abstract way, Mr. Green will frequently drift in the conversation, leaving the group wondering what he is actually talking about. However, the team member said Mr. Green is very motivated and is always ready to talk about his clinical issues. The team member said he recently discussed issues in his family and how his "life was laid out" by others and how this affected him. She said he is "as genuine as he can be." However at times Mr. Green does exercise "power and control" for example, Mr. Green was given an informed consent for treatment in group and he didn't sign the paper. When the group ended and he still hadn't signed it and turned it in, another group member asked Mr. Green "Aren't you going to sign it?" to which Mr. Green responded, "I'm gonna make her wait for it."

Regarding his understanding of his sexual offending, the team member said that Mr. Green talks about how he did not see his victims as "women" but rather, as "common street walkers" who exchanged sex for drugs. He acknowledges that he targeted these women because they were more "vulnerable" and because he "could use their addiction against them." Mr. Green has said that his offenses were both opportunistic and planned. The team member said Mr. Green is working on empathy, specifically, "working on looking at women as people." When asked about his deviant sexual interests, the team member said that Mr. Green admits to objectifying the women as prostitutes, and saw them as different from other women. Mr. Green has admitted that he "categorizes women" in terms of their worth, valuing for example, his daughter's mother. Mr. Green has reported that he only has fantasies of consensual sex with no violence.

When asked about his understanding as to why he quickly reoffended (21 days) after getting out of prison in that he raped another woman within a month of his release in 2002, the team member said that Mr. Green said he "didn't feel like he got treatment." He was extremely frustrated at the time with his father who he had sent money but the father had spent it. Then his father "kicked him out." Mr. Green said that his frustration grew and he committed another sexual assault.

Mr. Green has reported that he has a brother for support and other family members. He plans to work at the family gas station. When asked about the lifestyles of these supports, the team member said she believes Mr. Green's family members have also had issues with addiction and legal problems.

VIII. ADVISABILITY OF TRANSITION PROGRAM:

No plan was put before the Board. Thus, none was acted upon.

IX. DISCUSSION AND RECOMMENDATIONS:

Mr. Green is a 56 year old man who, on March 19, 2007, pled guilty to one count of Rape, and was sentenced to eight years to eight years and one day with 2179 days credited. It should be noted that regarding the same offense, Mr. Green was found guilty of Assault and Battery and sentenced to 2 ½ years in the House of Correction with 1659 days credited. A third charge of Being a Habitual Criminal was dismissed on March 19, 2007 as well.

Mr. Green has prior sexual offenses of record. On May 28, 1998, Mr. Green pled guilty to Rape and Assault to Rape, and was sentenced to five years to five years and 90 days for each conviction to run concurrently; on that same sentencing date, one count of Assault to Rape was (guilty) filed.

On August 31, 1991 Mr. Green pled guilty and was sentenced to five years for Indecent Assault and Battery; one count of Assault and Battery was (guilty) filed, and one count of Rape and one count of Kidnapping were dismissed. On that same sentencing date, Mr. Green was also given a guilty filed for Possession of Class B Substance, Cocaine.

On February 4, 1987 Mr. Green was found guilty of Rape and received a 15 year committed sentence. On that same sentencing date he was found guilty of Indecent Assault & Battery and Assault and Battery, and remanded to the House of Correction. On June 6, 1988 the judgment (on all charges) was reversed and set aside. On February 3, 1997 all charges were nol prossed as the victim was unable to testify in a 2nd trial.

Today's Board opined unanimously (5-0) that Mr. Green presents as a Sexually Dangerous Person as statutorily defined.

First, he has been convicted of an enumerated offense as noted above.

In the opinion of the Board, Mr. Green presents with a statutorily defined personality disorder which is "a congenital or acquired physical or mental condition that results in a general lack of power to control sexual impulses."

The Diagnostic and Statistical Manual, 5th Edition (DSM-5), defines a personality disorder as:

> ...an enduring pattern of inner experience and behavior that deviates markedly from the expectations of the individual's culture, is pervasive and inflexible, has onset in adolescence or early adulthood, is stable over time, and leads to distress of impairment.

Given Mr. Green's long criminal history starting at age 21 and continuing until his most recent arrest at 44 years old, and the fact that his criminal activity has involved physical and sexual violence as well as crimes involving property and substance abuse, the Board considered the diagnosis of Antisocial Personality Disorder. Again referencing the Diagnostic and Statistical Manual, 5th Edition (DSM-5):

A) A pervasive pattern of disregard for and violation of the rights of others occurring since age 15 years, as indicated by three (or more) of the following:

1) Failure to conform to social norms with respect to lawful behaviors as indicated by repeatedly performing acts that are grounds for arrest;

2) Deceitfulness, as indicated by repeated lying, use of aliases, or conning others for personal profit or pleasure;

3) Impulsivity or failure to plan ahead;

4) Irritability and aggressiveness, as indicated by repeated physical fights or assaults;

5) Reckless disregard for safety of self or others;

6) Consistent irresponsibility, as indicated by repeated failure to sustain consistent work behavior or honor financial obligations; and

7) Lack of remorse, as indicated by being indifferent to or rationalizing having hurt, mistreated, or stolen from another.

B) The individual is at least age 18 years.
C) There is evidence of Conduct Disorder with onset before age 15 years.
D) The occurrence of antisocial behavior is not exclusively during the course of schizophrenia or bipolar disorder.

Although Mr. Green had some troubles in his childhood, there is insufficient data to support a diagnosis of Conduct Disorder with onset before 15. However, Mr. Green's behavior as an adult exhibits many of the characteristics noted above, including instability in work, multiple sexual partners, unstable romantic relationships, and using and selling drugs. Mr. Green's sexual

offenses all involved preying on vulnerable women. His offenses demonstrate aggression, impulsivity, disregard for the safety of others, and a lack of remorse, in that he has rationalized his actions because the women were "common street walkers." Mr. Green's antisocial behaviors continued into his most recent incarceration where he received disciplinary reports for problems with authority, fighting, and possession of pornography. More recently, Mr. Green received an OBR on April 24, 2012 for fighting with his roommate where he gave the other man a "black eye" resulting in his suspension from treatment. He was then placed on an IBP. During the last review period, Mr. Green has struggled with verbal aggression and making sexualized comments resulting in his placement on a second IBP. While the Board acknowledged that a full diagnosis of ASPD cannot be met, all members concluded that the sum of Mr. Green's antisocial characteristics can be captured clinically by a diagnosis of Other Specified Personality Disorder, Antisocial features, and that this presentation contributed to Mr. Green's general lack of power to control his sexual impulses, thereby meeting the definition of a personality disorder as statutorily defined.

The Board also concluded that Mr. Green's offending was both repetitive and compulsive. He sexually assaulted more than one woman on more than one occasion, and his governing offense took place within a month of his release from prison on a previous sexual assault. Mr. Green has stated that in this offense there was planning. These factors demonstrate a compulsive quality to Mr. Green's pattern of offending.

In determining whether Mr. Green is likely to reoffend, the Board looked at empirically derived risk factors that are associated with sexual recidivism. With regard to static or historical factors, Mr. Green has a history of sexual and nonsexual violence, prior sexual offenses, a long criminal history, and unknown and unrelated victims. Regarding dynamic factors relevant to Mr. Green, he exhibits impulsivity, a lack of positive social influences, past difficulties with relationship stability, hostility toward women, lack of concern for others, and poor sexual self-regulation. He also presents with deviant sexual interests and substance abuse.

The Board considered Mr. Green's progress in treatment to date and whether he had advanced to the point where his risk to reoffend is sufficiently reduced. Mr. Green has been an active participant in the Sex Offender Treatment Program since being civilly committed. He has progressed to a Therapeutic Community where he is an engaged member of his unit. However, he has struggled with attitudes and behaviors that indicate ongoing antisociality. As noted above, Mr. Green was disciplined in April 2012 for getting into a fight with his roommate. This resulted in a suspension from treatment and an IBP. Mr. Green was able to address the goals of the IBP and continue to advance in treatment. However just in the past review period, Mr. Green was again placed on an IBP for behaviors that are inappropriate, including making a sexually inappropriate hand gesture to another resident and being verbally aggressive with his peers. It is concerning to the Board, that Mr. Green is still engaging in behaviors that seem driven by the same thoughts and feelings that were present during the time of his offending.

It is also concerning that while Mr. Green readily addresses clinical issues, he does so in a manner that is very concrete, as if one discussion is sufficient to address the particular risk factor. The Board would like to see Mr. Green move beyond a superficial understanding of his pathway to offending and gain a deeper knowledge of his risk factors. Mr. Green needs to demonstrate an integration of this understanding in a way that can be observed in his interactions toward others.

The Board also considered Mr. Green's age of 56. The empirical literature shows a decline in violent and sexual offending for older offenders. However, Mr. Green reoffended in his 40's. Further he has continued to exhibit physical and verbal aggression even while confined to a structured and secure setting. The Board acknowledges that Mr. Green has exhibited fewer overt antisocial behaviors in recent years, a decline that would be expected given his age; however, he still has more work to do to demonstrate greater emotional and behavior control, and to establish more prosocial patterns of behavior.

Mr. Green has been forthcoming about his deviant sexual interest in prostitutes. He has said that he saw them as objects and not as people. He preyed on them because they were vulnerable and he had the means to take advantage of them. However, Mr. Green has not yet addressed the violence and brutality he inflicted on his victims, and how he was able to terrorize and dehumanize them. The Board would encourage Mr. Green to address the level of sexual violence present in his assaults.

Finally, the Board is concerned about Mr. Green's stated release plan which involves reunification with his family and perhaps working in his family's business. Mr. Green has cited frustration with his family as an acute precipitant to his governing offense. Mr. Green's choice to return to an environment where others may be engaged in substance use or antisocial lifestyle will certainly put Mr. Green at risk for resuming his old patterns of behavior. The Board would encourage Mr. Green to develop a release plan that includes more stable supports.

In summary, the Board today opined unanimously that Mr. Green continues to meet the statutory criteria as a Sexually Dangerous Person and that he is likely to engage in future sexual offenses if released to the community. For all the reasons stated above the Board recommends that Mr. Green continue to be viewed as a Sexually Dangerous Person as statutorily defined and that he continues to require secure treatment at the Massachusetts Treatment Center.

Submitted on behalf of the Board by,

DocuSigned by:
Angela M. Johnson, Psy.D.
B040E3BB420342C...

Angela M. Johnson, Psy.D.
Member, Community Access Board

DISTRIBUTION:
Cc: Steven J. O'Brien, Superintendent
Niklos Tomich, Psy.D, CAB Chairperson
Resident
Treatment Center Records
CAB Members

COMMONWEALTH OF MASSACHUSETTS

PLYMOUTH, ss.
[Unified Session at Suffolk]

SUPERIOR COURT DEPARTMENT
OF THE TRIAL COURT
UNIFIED SESSION NO.
SUCR2011-10838 (SDP)

JAMES GREEN,
Petitioner,

v.

COMMONWEALTH,
Respondent.

COMMONWEALTH'S MOTION IN LIMINE REGARDING EXPERT TESTIMONY FROM PSYCHOLOGIST MEMBERS OF THE COMMUNITY ACCESS BOARD

It is the Commonwealth's understanding that the Court gives a limiting instruction regarding the weight that the jury may give to the opinions of psychologist members of the Community Access Board ("CAB"), when these psychologists are called to testify by the Commonwealth. The Commonwealth respectfully submits that such an instruction is an impermissible intrusion on the jury's exclusive province of weighing and crediting evidence. The Commonwealth thus moves the Court to refrain from giving such an instruction.

The Court's proposed limiting instruction well beyond the holding in *Johnstone, petitioner*, 453 Mass. 544 (2009), and is contrary to settled law. Nothing in *Johnstone* authorizes the instruction proposed by this Court. If the SJC had intended to so limit the CAB, they would have specifically said so. Instead, the SJC held that the qualified examiners perform a "gatekeeper" function in SDP trials. *See Johnstone*, 453 Mass. at 553. Once the Commonwealth presents evidence of a petitioner's sexual dangerousness through one qualified examiner, the

EXHIBIT 8

Commonwealth is then permitted to present further expert evidence through other experts, including expert psychologist member of the CAB.

This conclusion is supported by the SJC's decisions in *Commonwealth v. Blake*, 454 Mass. 267, 275 (2009), and *Commonwealth v. Cowen*, 452 Mass. 757, 762 (2008). In these cases, the SJC provides that expert evidence, properly admitted to the trier of fact, may be used to support a finding of sexual dangerousness, even if that evidence does not come from a qualified examiner. Notably, these decisions were issued just before and just after *Johnstone*. *Cowen* was decided four months before *Johnstone* and *Blake* was decided three months after *Johnstone*. In *Blake*, the Commonwealth presented testimony from one qualified examiner and from the probable cause expert retained by the District Attorney, who is a qualified examiner but was not testifying in that capacity. 454 Mass. at 270. Blake claimed that the Commonwealth lacked statutory authority to present an expert witness other than one who has been designated by the court as a qualified examiner. The Court held that this issue was considered and settled in *Commonwealth v. Cowen*, 452 Mass. 757, 762 (2008). *Blake*, 454 Mass. at 275.

In *Cowen*, the testimony of the probable cause expert was sufficient to support a SDP verdict. In rejecting Cowen's argument that the probable cause expert's testimony was deserving of little weight, and was insufficient to support a verdict, the SJC held, "This argument is unpersuasive. We reject the defendant's suggestion that [the probable cause expert's] testimony, even though admissible, deserved very little or no weight. The matter of how much weight is to be given a witness, particularly an expert witness, is a matter for the trier of fact, not an appellate court." *Cowen*, 452 Mass. at 762.

3

Cowen and *Blake* reiterated the well-established body of law that the weighing of the evidence and assessment of credibility is the exclusive province and classic function of the jury. *See, e.g., Commonwealth v. Walsh,* 376 Mass. 53, 60 (1978). The Court's proposed limiting instruction regarding the testimony of an expert psychologist member of the CAB constitutes an an impermissible intrusion on the jury's sole province of weighing and crediting the evidence.

As with any expert, it is psychologist's qualifications, and not the fact of membership on the CAB, that is relevant in determining the weight to be accorded to the opinion. *See, e.g., McLaughlin v. Board of Selectmen,* 422 Mass. 359, 363 (1996) (each expert should be qualified individually "with their relative qualifications going to the weight of their testimony"). In this case, the CAB psychologist is also a qualified examiner and has offered expert opinion on sexual dangerousness before this Court and many others. He has had access to the same records as the qualified examiners and petitioner's experts, forming a professional opinion based on his training, education and experience. The evaluation of his credibility and the weight to be given his opinion, as with any expert, is for the jury.

To the extent that any part of the instruction is based on the Appeals Court's analysis in *Johnstone*, it is important to bear in mind that the Appeals Court's decision in *Johnstone* has never issued. Because the SJC granted the Commonwealth's application for further appellate review, *see In re Johnstone,* 452 Mass. 1103 (2008), the Appeals Court never issues the rescript of its decision. *See* Mass. R. App. P. 23; *Commonwealth v. Aboulaz*, 44 Mass. App. Ct. 144, 148 (1998). The SJC's opinion is the relevant appellate opinion in *Johnstone*. *See In re Baylis*, 217 F.3d 66, 71 n. 3 (1st Cir. 2000).

CONCLUSION

The Commonwealth requests that the Court not give any limiting instruction regarding the weight that the jury may give to any testifying expert.

Respectfully Submitted
by the Commonwealth

NANCY ANKERS WHITE
Special Assistant Attorney General

Sabine M. Coyne
Massachusetts Department of Correction
Massachusetts Treatment Center
30 Administration Road
Bridgewater, MA 02324
(508) 279-8147
scoyne@doc.state.ma.us

Dated: March 3, 2015

CERTIFICATE OF SERVICE

I hereby certify that I did this day serve a photocopy of the above document upon the petitioner by email via his attorney of record, Sondra H. Schmidt.

Sabine M. Coyne

Dated: March 3, 2015

Westlaw.

— N.E.3d —, 2015 WL 1214608 (Mass.App.Ct.)
(Cite as: 2015 WL 1214608 (Mass.App.Ct.))

Only the Westlaw citation is currently available.

Appeals Court of Massachusetts,
Suffolk.

George SOUZA, petitioner.

No. 13–P–1052.
June 3, 2014.
March 18, 2015.

Sex Offender. Practice, Civil, Sex offender, Directed verdict, Instructions to jury. *Evidence,* Sex offender, Expert opinion.
Petition filed in the Superior Court Department on February 2, 2009.
The case was tried before *Diane M. Kottmyer,* J.
Mary P. Murray for the Commonwealth.

Michael A. Nam–Krane for the petitioner.

Present: KANTROWITZ, MILKEY, & HANLON, JJ.

HANLON, J.

*1 George Souza filed a petition in Superior Court seeking release from his civil confinement as a "sexually dangerous person" (SDP). See G.L. c. 123A, § 9. At trial, the jury was unable to reach a verdict and, thereafter, the trial judge allowed Souza's motion for a directed verdict of not guilty. The Commonwealth appeals, arguing there was sufficient evidence to permit a retrial. We agree and reverse.

Background. We recite the evidence heard by the jury in the light most favorable to the Commonwealth. *Commonwealth v. Cowen,* 452 Mass. 757, 763 (2008). Souza has a significant adult criminal record, extending over a period from 1963 until his last conviction in 2000.[FN1] In 1971, he pled guilty in New York to "rape in the second degree" for having "engaged in sexual intercourse with ... [a] female less than ... fourteen years of age." [FN2] Souza has maintained that the victim was working as a "prostitute" at the time, that she looked eighteen to him, and that she agreed to engage in sex with him. Nevertheless, in one interview, he also stated, "[A] little girl came ... it was my fault ... this little child ... I should never [have] went with this child." When asked how old the girl had been, he said, "I have no idea ... I don't even want to guess." He was then twenty-seven years old. On another occasion, in 2011, Souza asserted that the police entered the room where he was with the victim "before any sexual activity took place." More recently, in a group therapy session in 2012, Souza, discussing the New York offense, told the group that he had "engag[ed] in sexual intercourse with a 15–year–old prostitute ... [and] that she did not look 15 because they make them bigger in New York."

FN1. There was evidence that Souza first came to the attention of the police when he was eleven years old. At the trial, his record showed Massachusetts convictions for indecent assault and battery on a child under fourteen, robbery, larceny from the person, breaking and entering with intent to commit a felony, and larceny from a building. There were convictions in New York for criminal possession of a forged instrument, endangering the welfare of a child, and rape in the second degree. The "counterfeiting and the endangering of a child's welfare ... charge[s] [were apparently] a result of having three young adolescent boys essentially run the counterfeit money into various establishments and get change for objects that Mr. Souza then kept or split with the boys."

The record also indicates that Souza has "committed crimes in a number of [other] states including ... Rhode Island, Oklahoma, Nevada, and California."

EXHIBIT 9

— N.E.3d —, 2015 WL 1214608 (Mass.App.Ct.)
(Cite as: 2015 WL 1214608 (Mass.App.Ct.))

FN2. The same indictment also charged Souza with, on or about May 25, 1971, until on or about June 7, 1971, two counts of "promoting prostitution in the first degree" by "knowingly advanc[ing] and profit[ing] from prostitution of a person less than sixteen years old, to wit, [a victim], aged thirteen." A third count charged Souza with "promoting prostitution in the second degree," committed as follows: Said defendant ... advanced and profited from prostitution by managing, supervising, controlling and owning, a house of prostitution and a prostitution business and enterprise involving prostitution activity by two prostitutes." Those charges apparently were dropped, and, because the names of the victim or victims were redacted from the copy of the indictment introduced at trial, it is not completely clear whether the victim of the rape charge was also the subject of the prostitution charges. However, in a 2003 evaluation by John Daignault, Psy.D., Souza stated that, after he paid the victim in the 1971 rape case, the victim "asked to stay with him and he let her, and he ended up getting arrested several days later because he was letting her 'trick' out of his house and the police investigated."

Souza's conviction in 2000 for indecent assault and battery on a child under the age of fourteen arises out of an incident in 1990 with a nine year old boy in Fall River. After he was arrested, Souza defaulted and left the State. Arrested on another charge in New York, Souza was returned to Massachusetts and pleaded guilty in 2000. The Commonwealth alleged that Souza had offered the victim a ride on a motorcycle, and then accosted him, pulling down his pants and the victim's pants and then putting his penis in the victim's mouth and ejaculating. Souza told the victim not to tell his mother or he would "hurt him bad." At the plea hearing, Souza admitted only to rubbing the victim's penis and thereafter denied any involvement in the incident, accusing the victim's mother of fabricating the story and his lawyer of forcing him to plead guilty.

For that incident, Souza received a sentence of three years to three years and one day. Before his release, the Commonwealth filed a petition alleging that Souza was sexually dangerous under the provisions of G.L. c. 123A, §§ 1, 12 – 16. After a jury-waived trial, the judge found Souza to be an SDP and committed him to the Massachusetts Treatment Center (Treatment Center) for an indefinite term. See G.L. c. 123A, § 14. Souza appealed, challenging both the sufficiency of the evidence that he was an SDP and the use of statements he made to the Commonwealth's expert. This court affirmed in a memorandum and order pursuant to our rule 1:28. See *Commonwealth v. Souza*, 70 Mass.App.Ct. 1105 (2007).

*2 Souza's record while incarcerated reveals a number of incidents. He was the victim of an assault by other inmates at least once. In addition, he was disciplined for some relatively minor infractions, along with physical altercations on a number of occasions. At the Treatment Center, he received twenty-three "Observation of Behavior Reports" (OBRs) during the decade he was confined there. Those records included some substantiated incidents of violence: in 2004, Souza got into a physical altercation with his roommate, and in February of 2012, he spat at and pushed another resident and then banged his own head on a cell door to make it look as though a guard had attacked him.

It is undisputed that Souza did not complete sex offender treatment while he was at the Treatment Center. In fact, although he had begun the initial phase of treatment during his incarceration for the incident with the nine year old boy, Souza did not enroll in any treatment during his first six years at the Treatment Center. Despite his regular attendance in treatment classes thereafter, Souza made only limited progress. At the time of trial, when Souza was sixty-nine, he remained in the early stages of the treatment programs offered to him.

— N.E.3d —, 2015 WL 1214608 (Mass.App.Ct.)
(Cite as: 2015 WL 1214608 (Mass.App.Ct.))

FN3

FN3. In 2012, the Treatment Center subjected Souza to a "penile plethysmograph" (PPG) test designed to measure the extent to which he was aroused by various appropriate and inappropriate stimuli. According to the test evaluator, Souza did not demonstrate any significant arousal to any stimuli, and, based on those results, behavioral conditioning was not recommended at that time.

In March of 2012, a divided Community Access Board (CAB) concluded in a four-to-one vote, that Souza no longer met the criteria of an SDP. The two qualified examiners (QEs) who examined him also were divided on the question.

The Commonwealth's case at trial. At trial, the Commonwealth relied primarily on the testimony of two experts.[FN4] Frederick W. Kelso, Ph.D., one of the QEs, testified that Souza suffered from "pedophilia" and " antisocial personality disorder " (APD), as those terms are defined in the American Psychiatric Association's Diagnostic and Statistical Manual of Mental Disorders (rev. 4th ed. 2000) (DSM–IV). Kelso opined that those mental conditions interfered with Souza's ability to control his sexual urges, and that he was likely to reoffend if not confined. He identified Souza's "risk factors" as having committed a prior sex offense, including a sex offense against a stranger, sex offenses against children not related to him, and a sex offense against a male. Kelso also noted Souza's "past experience of deviant sexual preferences, and his failure to complete sex offender treatment at the Treatment Center." At the time of the Fall River incident, Souza was "then forty-six years old, and the victim of the sex offense was a boy who was then nine years and one month old."

FN4. Two other Commonwealth witnesses testified briefly. The deputy superintendent of classification and treatment at the Treatment Center testified that Souza exercised regularly, running laps in the exercise yard, and that Souza has spoken to him about how important it is for him to stay in good physical shape. The assistant treatment coordinator at the Treatment Center testified that Souza had been suspended from participation in group therapy for a "physical altercation that took place" between Souza and another resident and that there had been unexcused absences from the group as well.

Niklos Tomich, Psy.D., chair of CAB, filed a minority report from the CAB, concluding that Souza was still sexually dangerous. He essentially agreed with Kelso. Tomich described Souza as an "outlier.... [I]t means somebody who differentiates from the norm." [FN5] According to Tomich, Souza "essentially showed an enduring and rather chronic course of antisocial behavior. That has been unremitting. He has shown very little remorse. He essentially continues to obfuscate responsibility for the crimes for which he was convicted, especially the sex offenses, which is what [Tomich was] mostly concerned about."

FN5. Tomich explained that Souza "has two convictions of sexual offenses, but he also has a very long criminal history that includes seventeen additional convictions ... including other types of offenses.... Subsequent to his most recent period of incarceration and then civil commitment, he also has approximately twenty-five disciplinary reports, some of them of a violent nature."

*3 Significantly, Tomich also opined that Souza "meets the criteria for pedophilia." [FN6] He pointed out that "both his victims were children [and that] ... [w]hat stood out ... for those offenses was the fact that they occurred over a very long period of time. And, in addition, he has both a male victim and a female victim. So, this tends to increase his victim pool." In addition, Tomich found significant the fact that the girl victim was a

— N.E.3d —, 2015 WL 1214608 (Mass.App.Ct.)
(Cite as: 2015 WL 1214608 (Mass.App.Ct.))

stranger, thus increasing the pool of potential victims, and that, when Souza committed the offense against the boy victim, he knew about the possible repercussions in the criminal justice system, having previously served a four year sentence in New York.

> FN6. In her memorandum of decision, the judge stated that, while Tomich found that Souza exhibited signs of pedophilia, "he did not diagnose Mr. Souza with" that disorder. Although the import of the distinction the judge drew is not entirely clear, Tomich made it plain that he did in fact diagnose Sousa with pedophilia. In response to the prosecutor's question, "Did you diagnose Mr. Souza with anything else?" Tomich replied, "Yes." To the question, "And what was that?" Tomich replied, "He also meets the criteria for pedophilia."

Tomich contrasted those "static factors," factors that do not change over time, with "what are called dynamic factors or factors that ... may change over time, that may get stronger or weaker, depending on the situation [Souza's] in." In this case, those factors also supported Tomich's conclusion that Souza was an SDP, particularly his "unwillingness to abide by the mores and folkways and rules of society. He just doesn't want to do that and he hasn't." Tomich also considered Souza's unwillingness to take responsibility for either offense.

Tomich did consider protective factors, including Souza's age of sixty-nine, an age at which sex offenders often are considered less dangerous. Tomich noted that Souza's second sex offense took place when he was forty-six and that his last criminal arrest took place when he was fifty-five; in addition, Souza's behavior in the Treatment Center included offenses that could have been charged as criminal had he not been held. Finally, while Souza was engaged in treatment, he was only at a preliminary stage of that treatment, a level that Tomich found "inadequate." In support, he pointed to a treatment note from a group therapy session less than two months before the trial. In that group, Souza had given three different accounts of the New York offense and the surrounding circumstances within the time of one session. Tomich stated that he wasn't suggesting that Souza was lying. Instead, he stressed that Souza "is disordered and requires treatment.... [A] function of his disorder is that he distorts his history and distorts events in the record. That complicates and confounds treatment."

Souza's case. Souza countered with testimony from four experts: Michael G. Henry, Psy.D. (the other QE), Michael J. Murphy, Ed.D. (the CAB member who authored the CAB majority report), and two privately-retained psychologists. Focusing especially on Souza's advanced age, the PPG results, and the limited evidence that he suffered from any sexual compulsions at the time of trial, those experts opined that Souza was not currently sexually dangerous and did not present a likelihood of reoffending.

The directed verdict. Souza moved for a directed verdict after the Commonwealth rested its case and again at the end of the trial. The judge reserved ruling on the motion and sent the case to the jury.[FN7] The jury reported that they had reached "an impass[e]," and they "remain[ed] deadlocked" even after receiving a *Tuey–Rodriquez* charge.[FN8] See *Commonwealth v. Rodriquez*, 364 Mass. 87, 101–102 (1973). The judge discharged them and allowed both sides to submit briefing on Souza's motion for a directed verdict. In a memorandum of decision issued on April 11, 2013, the judge allowed Souza's motion. Judgment entered, and this appeal ensued.[FN9]

> FN7. The case had been tried earlier to a different jury, but a mistrial was declared after Souza became ill.
>
> FN8. In a jury trial held on a G.L. c. 123A, § 9, release petition, the jury may act through a five-sixths majority, as is gener-

ally true in civil cases. *Sheridan, petitioner,* 422 Mass. 776, 780–781 (1996). See generally G.L. c. 234, § 34A.

FN9. Judgment entered in Souza's favor on April 17, 2013, but the judge temporarily stayed Souza's release to allow the Commonwealth time to determine whether to appeal. The Commonwealth filed its notice of appeal on April 29, 2013. It then requested that Souza's release further be stayed, and Souza cross-moved, requesting that he be released pending appeal subject to various specified conditions, including global positioning system (GPS) monitoring. The trial judge allowed Souza's motion, and a single justice of this court denied the Commonwealth's motion for a stay pending appeal. The Commonwealth then pursued a stay through filing a petition pursuant to G.L. c. 211, § 3. A single justice of the Supreme Judicial Court denied that petition on June 26, 2013. Souza eventually was released pursuant to an amended "order of discharge" entered on June 28, 2013, that included GPS monitoring and nine other conditions. He has completed all of his sentences and has no probation or parole conditions remaining on any underlying offense.

*4 In her memorandum of decision, the judge ruled that "[a] properly instructed rational juror could not find that the Commonwealth had proved beyond a reasonable doubt that petitioner suffers from Pedophilia as defined in the DSM IV." In a footnote, she stated, "[a]ll of the experts, including Dr. Kelso, testified that the criteria for Pedophilia in the DSM–IV include 'over a period at least 6 months, recurrent, intense, sexually arousing fantasies, sexual urges or behaviors involving sexual activity with a prepubescent child or children (generally 13 years of age or younger).' " While the judge acknowledged that the nine year old male victim in the 1990 incident clearly was prepubescent, she found the evidence insufficient to support a conclusion that the thirteen year old female victim in the 1971 incident was prepubescent. In so doing, the judge relied on the testimony of a defense expert, saying that "[t]he Tanner scale, which is used by pediatricians to stage physical sexual development of children, places a 13 year old at 85–90% post-pubescent." From this, the judge concluded that it was "very unlikely" that the thirteen year old was prepubescent and therefore the conclusion of both Commonwealth experts, based as it was on "an insufficient evidentiary foundation," was not sufficient to meet the Commonwealth's burden of proof.

While the judge acknowledged that the "evidence was sufficient to support a finding beyond a reasonable doubt that petitioner today suffers from an Antisocial Personality Disorder," in her view, that diagnosis alone was not sufficient because, as she said (rightly), "to establish sexual dangerousness, the Commonwealth must prove beyond a reasonable doubt that the mental condition causes serious difficulty in controlling sexual impulses *today*." She concluded:

"[T]he petitioner is 69 years old today. His most recent sexual offense or sexual misconduct of any kind was in 1990. He was a fugitive for eight years and has been incarcerated since 1999. There is no evidence of any sexual interest in children or sexual acting out of any kind during the years petitioner lived in the community on bail and as a fugitive (1991–1999) or during the thirteen years since his incarceration on the 1990 offense and subsequent civil commitment (1999 to the present)."

Given the fact that the "only evidence of sexual interest in children on the part of petitioner are the crimes committed in ... 1971 and 1990," the judge dismissed as inappropriate considerations of Souza's failure to engage in treatment, score on the "Static 99" and "antisocial tendencies."

Discussion. Sufficiency. The issue is "whether,

— N.E.3d —, 2015 WL 1214608 (Mass.App.Ct.)
(Cite as: 2015 WL 1214608 (Mass.App.Ct.))

after viewing the evidence (and all permissible inferences) in the light most favorable to the Commonwealth, any rational trier of fact could have found, beyond a reasonable doubt, the essential elements of sexual dangerousness as defined by G.L. c. 123A, § 1." *Commonwealth v. Blake,* 454 Mass. 267, 271 (2009) (Ireland, J., concurring), quoting from *Commonwealth v. Boyer,* 61 Mass.App.Ct. 582, 589 (2004). Applying that standard, we are satisfied that the Commonwealth's evidence here was sufficient to reach the jury.

*5 As relevant to this case, a " '[s]exually dangerous person', [is] any person who has been ... (iii) previously adjudicated as such by a court of the commonwealth and whose misconduct in sexual matters indicates a general lack of power to control his sexual impulses, as evidenced by repetitive or compulsive sexual misconduct by either violence against any victim, or aggression against any victim under the age of 16 years, and who, as a result, is likely to attack or otherwise inflict injury on such victims because of his uncontrolled or uncontrollable desires." G.L. c. 123A, § 1, as appearing in St.1999, c. 74, § 6. As the Commonwealth argues, the first two elements of the statute are not at issue.

In support of the third element, the Commonwealth offered two expert witnesses, each of whom testified that, in his opinion, Souza was an SDP. There was no challenge to the expertise of either witness, and the testimony itself was admitted without objection. Each of the Commonwealth expert witnesses testified that Souza suffered from antisocial personality disorder and pedophilia. "[E]ither diagnosis is adequate to satisfy the definitional requirements of a sexually dangerous person in G.L. c. 123A, § 1." *Commonwealth v. Reese,* 438 Mass. 519, 526 n. 9 (2003). Kelso testified that, in his opinion, Souza's behavior in committing the two separate sexual offenses was repetitive and compulsive,[FN10] and "at the present time, Mr. Souza is not adequately able to control his sexual impulses and would not be able to adequately control his sexual impulses if he were to now be released from the Treatment Center." Tomich also testified that Souza's offenses were repetitive and compulsive and that he was unable to "effectively intervene in or control his sexual impulses." Each expert opined that, "if released, Mr. Souza would be likely to re-offend sexually if not confined to a secure facility."

FN10. Dr. Kelso noted that, notwithstanding the fact that Souza was put on notice by the State of New York in 1971 that his behavior in committing the sexual offense against the young girl was "inappropriate and criminal and that engaging in that kind of conduct would result in a serious negative consequence, incarceration," Souza went on to commit a second sexual offense in Massachusetts, which "speaks to the sense that he's compelled to engage in the behavior even after he experiences a negative consequence."

The judge's conclusion to the contrary rests significantly upon her acceptance of the defense witness's testimony about the "Tanner scale['s]" definition of prepubescence and the consequences of that definition for the DSM–IV's definition of pedophilia. That was an issue of credibility that should have been left to the jury. "The matter of how much weight is to be given a witness, particularly an expert witness, is a matter for the trier of fact.... See *Hill, petitioner,* 422 Mass. 147, 156 (1996). This is particularly true of experts in the medical field, who regularly are permitted to testify on the basis of examination of records and other materials with respect to an issue in dispute." *Commonwealth v. Cowen,* 452 Mass. at 762.

As the courts have noted repeatedly, "the sexually dangerous persons statute makes no reference to [the DSM–IV], nor does it set forth any requirement that the statutory definition of mental abnormality be limited to the abnormalities outlined in the DSM–IV. Cf. *Doe, Sex Offender Registry Bd. No. 1211 v. Sex Offender Registry Bd.,* 447 Mass. 750, 765 n. 13 (2006) ('[p]edophilia is a psychiatric

— N.E.3d —, 2015 WL 1214608 (Mass.App.Ct.)
(Cite as: 2015 WL 1214608 (Mass.App.Ct.))

disorder, not a legal classification')." *Commonwealth v. Starkus*, 69 Mass.App.Ct. 326, 336 (2007) . See *Commonwealth v. Husband*, 82 Mass.App.Ct. 1, 5 (2012) ("[T]he legal definition of personality disorder applicable to SDP proceedings is not required to match the clinical definition of personality disorder found in the American Psychiatric Association's Diagnostic and Statistical Manual of Mental Disorders (4th ed. 2000) (DSM–IV).... The technical distinctions among various clinical diagnoses are immaterial so long as the Commonwealth proves beyond a reasonable doubt that the defendant suffers from a 'personality disorder which makes [him] likely to engage in sexual offenses if not confined to a secure facility.' G.L. c. 123A, § 1").

*6 Equally important, the DSM–IV definition of pedophilia *on its face* describes prepubescent as "generally age 13 or younger." *Commonwealth v. Starkus, supra* at 336. It is only the gloss added by the defense expert's definition of prepubescence that permitted the judge to opine that it was "very unlikely" that this thirteen year old female victim was "prepubescent" in 1971, despite Souza's description of her (at least once) as having been a "little child" when he raped her. In fact, regardless of the precise state of the child's anatomical development, this victim was far below the age of consent and Souza's actions with her, at age twenty-seven, reasonably could be seen by a factfinder as manifesting a form of "mental abnormality" within the meaning of the statute.

Nor can the petitioner's age or the length of time since his last conviction for a sex offense be considered dispositive here. Each of the Commonwealth's experts considered those factors as protective and reasonably concluded that, considering all of the factors, they did not change the assessment. For example, Kelso relied in part on the so-called "Static 99R" model, a predictive tool that takes into account a subject's age. Applying that model to the particulars of Souza's offenses and history, Kelso scored him as a five or a six, the latter score falling into the range of what is considered a high risk of reoffending.[FN11] Thus, the jury had before it empirically-based evidence that Souza presented a high risk to reoffend notwithstanding his age.

FN11. In Kelso's testimony and his report, he referred to "Static–99." Asked by the prosecutor to explain what that was, Kelso responded that it was "a very widely used sex offender risk assessment instrument." A different version, "the Static–99R adjusts the age item so that if you're an older sex offender, your advanced age is taken into account in terms of your total score." Kelso testified that Souza's score was slightly lower on the Static–99R than on the Static–99, but that he remained a high risk to offend, even with the lower score. Specifically, Kelso testified that "while [he thought Souza's] current age [was] one factor that merits consideration in the risk assessment, [he didn't] think it so overwhelm[ed] his status on the other risk factors as to be the only risk factor worthy of consideration." In particular, Kelso noted that Souza was forty-six when he committed the 1990 sex offense with the boy victim.

The law is clear that the lapse of time, by itself, is not dispositive, particularly when the petitioner has been held for a significant period of time in a secure environment with no opportunity to interact with young children. See *Commonwealth v. Blanchette*, 54 Mass.App.Ct. 165, 178 (2002) ("[T]he judge appears to have reduced the grounds for the expert's opinion only to [the petitioner's] prior sex crimes, ignoring in the process other factors which he considered when forming his opinion, such as [the petitioner's] personal history and [his] decision, while incarcerated, to decline sexual offender treatment. As to the latter, the Supreme Judicial Court cogently observed in ... *Hill*, [*petitioner*,] 422 Mass .... [at] 157, ... that

'[e]xamples of recent conduct showing sexual

— N.E.3d —, 2015 WL 1214608 (Mass.App.Ct.)
(Cite as: 2015 WL 1214608 (Mass.App.Ct.))

dangerousness may often be lacking where the individual's dangerous disposition is of a sort that there will be no occasion for that disposition to manifest itself in a secure environment. And it cannot be the case that an individual's refusal to submit to examination or to participate in treatment, in which his current dispositions might manifest themselves, will more or less automatically guarantee himself a favorable determination' ").

The court's language in *Commonwealth v. Reese*, 538 Mass. at 526 is instructive here. "It is ... apparent from the record that the ruling is an expression of the judge's personal conclusion regarding the expert[s'] credibility, based on [her] own opinion of the proper application of the DSM–IV, and the significance of the differences between [the experts'] testimony and the DSM–IV text. This was error. The testimony of the expert[s] is not 'so incredible, insubstantial, or otherwise of such a quality that no reasonable person could rely on it.' *Commonwealth v. Blanchette, supra* at 175."

*7 *Jury instructions.* The Commonwealth also argues that the judge erred in instructing the jury with regard to the extent it was to rely on the testimony of Kelso (who testified as a QE), as opposed to the testimony of Tomich (who did not). Specifically, based on her reading of *Johnstone, petitioner*, 453 Mass. 544, 553 (2009), the judge instructed the jury that:

"You heard of testimony from Dr. Tomich, a representative of the community access board. The law permits a representative of the community access board to testify in all proceedings like this one, and you may certainly rely upon the testimony of Dr. Tomich. However, you cannot find that the petitioner, Mr. Souza, is sexually dangerous based solely on the testimony of Dr. Tomich. In order for you to find that Mr. Souza is today a sexually dangerous person, you must find support for that determination in the opinion that [sic] Dr. Kelso, who testified as a qualified examiner."

Because the propriety of this instruction is likely to arise again in a retrial, we address it now.

We agree with the Commonwealth that such an instruction is not compelled by *Johnstone*, and that it is otherwise inadvisable. *Johnstone* held only that the Commonwealth cannot continue to pursue SDP confinement of someone unless at least one of the two assigned QEs concludes that the person is an SDP. *Id.* at 553. That precondition was satisfied here. As the judge herself recognized, in determining whether someone is an SDP, jurors are not precluded from relying on evidence from non-QE sources. The judge's efforts to acknowledge this to the jury, while still trying to create a special evidentiary role for the QE, led to an instruction that was confusing at best and not a fair statement of the law. Where, as here, the gatekeeping role served by QEs has been satisfied, and the Commonwealth offers additional expert testimony, a trial judge should refrain from suggesting the relative weight the jury can or should assign to the various Commonwealth experts.[FN12]

FN12. The Commonwealth also seeks review of Souza's release on conditions pending appeal. However, it did not file a notice of appeal regarding any of the orders that allowed his release pending appeal, and therefore cannot seek review of such orders now. As Souza points out, the propriety of his release pending appeal is also now moot.

Conclusion. We vacate the judgment and remand this matter to Superior Court for further proceedings consistent with this opinion.

So ordered.

MILKEY, J. (dissenting).

The majority's well-reasoned opinion has a superficial logic that is difficult to contest. In addition, I agree that it is important that judges usurp neither the fact-finding role assigned to juries, nor the gatekeeping role assigned to "qualified examiners"

— N.E.3d —, 2015 WL 1214608 (Mass.App.Ct.)
(Cite as: 2015 WL 1214608 (Mass.App.Ct.))

(QEs) pursuant to G.L. c. 123A. Nevertheless, for the reasons set forth below, I ultimately agree with the trial judge that the Commonwealth's evidence that George Souza is currently a "sexually dangerous person" (SDP), as defined by G.L. c. 123A, § 1, was so insubstantial that, as a matter of law, it cannot justify his continued detention. I therefore respectfully dissent.

In examining the sufficiency of the Commonwealth's proof, it is important to consider the extraordinary context in which this dispute arises. It is uncontroverted that Souza has both committed odious crimes and fully served his punishment for those crimes; indeed, he already has been deprived of his liberty for almost a decade after his prison term ended. The Commonwealth seeks to have him reconfined not in punishment for his past crimes but in anticipation that he may commit future ones. In this context, the ordinary rule barring propensity evidence does not apply. In fact, propensity is the main focus of SDP proceedings, and experts are called upon to speak directly to that issue (with seeming oracular certitude). Contrast *Commonwealth v. Sepheus*, 468 Mass. 160, 172 (2014) (defense counsel determined to have been constitutionally ineffective for failing to move to strike expert testimony that went directly to defendant's guilt).

*8 By definition, preventative detention schemes allow people to be locked up for crimes they indisputably have not committed, even in the face of the constitutional presumption of innocence. As the United States Supreme Court has held, the constitutionality of such schemes depends on the theory that the people so confined suffer from distinct mental conditions that prevent them from controlling their dangerous behaviors in the future. *Kansas v. Hendricks*, 521 U.S. 346, 358–360 (1997). It necessarily follows that, absent an adequate medical foundation, the constitutionality of continued confinement is called into question. See *id.* at 373 (Kennedy, J., concurring) ("[I]f it were shown that mental abnormality is too imprecise a category to offer a solid basis for concluding that civil detention is justified, our precedents would not suffice to validate it").[FN1] This constitutional overlay needs to be kept in mind in assessing the adequacy of the nature and quantum of the Commonwealth's evidentiary proof. When such considerations are taken into account, the Commonwealth's proof here falls short of acceptable norms.

FN1. See also *Matter of State of N.Y. v. Shannon S.*, 20 N.Y.3d 99, 109–110 (2012) (Smith, J., dissenting), quoting from *Kansas v. Crane*, 534 U.S. 407, 413 (2002) ("[U]nless 'mental abnormality' is defined with scientific rigor, [sexual dangerousness] statutes could become a license to lock up indefinitely, without invoking the cumbersome procedures of the criminal law, every sex offender a judge or jury thinks likely to offend again[; such statutes] must be limited to people who can be shown by scientifically valid criteria to have a 'serious mental illness, abnormality, or disorder'—one that distinguishes them 'from the dangerous but typical recidivist convicted in an ordinary criminal case' ").

Certainly, the majority is correct that existing cases state that judges in SDP cases must proceed with caution before directing a verdict against the Commonwealth (or issuing a like order finding the Commonwealth's case deficient as a matter of law). Thus, where there are competing expert opinions on whether someone is an SDP, a judge is not free to pick and choose which opinions to credit; that job falls to the jury. See *Commonwealth v. Reese*, 438 Mass. 519, 525–526 (2003). However, the cases do not stand for the proposition that once a QE has opined that someone is an SDP, a judge therefore must allow the case to go to the jury. To the contrary, they continue to recognize that a judge properly may terminate an SDP proceeding if the Commonwealth's evidence is "so incredible, insubstantial, or otherwise of such a quality that no reasonable person could rely on it to conclude that the

— N.E.3d —, 2015 WL 1214608 (Mass.App.Ct.)
(Cite as: 2015 WL 1214608 (Mass.App.Ct.))

Commonwealth had met its burden of proof." *Id.* at 524, quoting from *Commonwealth v. Blanchette*, 54 Mass.App.Ct. 165, 175 (2002).[FN2] In my view, this is just such a case.

FN2. The Commonwealth suggests that the QE's gatekeeping role effectively precludes a trial judge from scrutinizing the sufficiency of the evidence. In my view, the extraordinary context of preventative detention demands that judges continue to play such a role. Moreover, as this case well illustrates, in light of how the SDP scheme is structured, relying on juries to weed out unmeritorious SDP cases goes only so far. Although the Commonwealth was unable at trial to convince the requisite number of jurors to find that Souza remains an SDP, he now—over five years after his G.L. c. 123A, § 9, petition was filed—again faces the prospect of indefinite confinement. After retrial, he could be confined even in the absence of a jury finding that he currently is an SDP so long as a sufficient number of jurors held out for such a finding. This presents serious cause for concern, especially given that the underlying subject area is one that is "ruled by emotions." *Commonwealth v. Sullivan*, 82 Mass.App.Ct. 293, 319 (2012) (Milkey, J., dissenting).

Souza was sixty-nine years old at the time of trial. At that point, the statutory rape he committed was over four decades old, and the indecent assault and battery on a child (the only other sex offense at issue in this case) was over two decades old. As the Commonwealth's lead expert, Frederick W. Kelso, Ph.D., himself acknowledged, peer-reviewed empirical studies show that once sex offenders reach their sixties and seventies, they "tend not to be very likely to commit future sex offenses." Of course, that concession by itself does not present an insurmountable obstacle to the Commonwealth. Even if sex offenders generally are not very likely to reoffend at Souza's age, this does not preclude proof that Souza in particular suffers from mental conditions that render him likely to do so. However, such proof is lacking on the current record.

*9 The Commonwealth's experts relied in great part on their classifying Souza as a "pedophile" within the meaning of the American Psychiatric Association's Diagnostic and Statistical Manual of Mental Disorders (rev. 4th ed. 2000) (DSM–IV). According to them, it was the combination of pedophilia and " antisocial personality disorder " (APD) that created the undue risk that he would reoffend. In the words of the Commonwealth's second expert, psychologist Niklos Tomich, "Mr. Souza's Pedophilia results in his deviant arousal and behavior and his Antisocial Personality Disorder provides him the psychological means to engage behaviorally in, and then excuse, his behavior."

According to the DSM–IV, "a diagnosis of pedophilia requires '[a] period of at least six months, recurrent, intense sexually arousing fantasies, sexual urges, or behaviors involving sexual activity with a prepubescent child or children (generally age 13 or younger).' " *Commonwealth v. Starkus*, 69 Mass.App.Ct. 326, 336 (2007), quoting from the DSM–IV. As applied to the facts here, this required proof that the 1971 victim was prepubescent. The trial judge found the Commonwealth's proof of that point legally insufficient. The majority rejects the judge's reasoning on three grounds: (1) the Commonwealth is not bound by the definitions of the DSM–IV, (2) the state of the 1971 victim's anatomical development is irrelevant because she was in any event well below the age of consent, and (3) the Commonwealth put forward sufficient proof that the 1971 victim was prepubescent (thus in any event satisfying the definition of "pedophilia" set forth in the DSM–IV). I address these points in that order.

We have long recognized the DSM as the standard diagnostic authority in the psychiatric and psychological professions. See *Lambley v. Kameny*, 43 Mass.App.Ct. 277, 278 n. 4 (1997). Neverthe-

less, as the majority correctly points out, in building a case that a sex offender suffers from a "mental abnormality" or "personality disorder," within the meaning of the SDP statute, the Commonwealth is not limited to those mental conditions enumerated and defined in the DSM. See *Commonwealth v. Husband*, 82 Mass.App.Ct. 1, 4–5 (2012), and cases cited. Of course, this does not prohibit Commonwealth experts from relying on the DSM; indeed, given the authoritative stature that the DSM enjoys in the medical community, it is hardly surprising that many experts would base their opinions on that source. Where, as here, the Commonwealth experts did just that, it is fair and appropriate to hold them to this, and the cases that the majority cites are not to the contrary.[FN3] When the Commonwealth's case is predicated upon a specific expert diagnosis of pedophilia as defined in the DSM, a lack of evidence of one of the definitional criteria may not be excused. Otherwise, the Commonwealth would be relieved of its burden of proving the underlying facts on which its expert's diagnosis was based. See *Narducci v. Contributory Ret. Appeal Bd.*, 68 Mass.App.Ct. 127, 135 (2007) (noting the distinction between an expert's ultimate conclusion and the "assumed" facts, which must be proved, on which the opinion is based).

FN3. *Commonwealth v. Reese*, 438 Mass. at 520, was an appeal from a judge's finding of no probable cause after a hearing under G.L. c. 123A, § 12(*c*). The Supreme Judicial Court explained that at least in that context, the Commonwealth's expert could rely on clinical observations and experience independent of the DSM criteria to make a diagnosis of pedophilia. *Id.* at 525–526. *Reese* thus involved a situation in which the Commonwealth's expert explained that he was not resting his diagnosis on the DSM–IV. *Reese* does not say that where an expert relies on the DSM–IV at trial, the Commonwealth is excused from producing evidence that the DSM–IV criteria have been met.

*10 As the majority also accurately notes, the 1971 victim was well under the age of consent regardless of whether she was prepubescent. Therefore, the state of her anatomical development is irrelevant for purposes of determining whether a crime had been committed. However, whether Souza committed a crime and whether his actions show that he suffered from a particular "mental abnormality" are distinct questions. The DSM–IV does not classify an adult's attraction to anatomically developed but still underage adolescents as a "mental abnormality." [FN4] While the Commonwealth's experts could have sought to explain why they considered Souza as suffering from "pedophilia" apart from the definition in the DSM–IV, they did not do so.[FN5]

FN4. That is hardly surprising given that, as Judge Smith of the New York Court of Appeals trenchantly has observed in writing for a three-judge dissent, "the idea that a man's mere *attraction* to pubescent females is abnormal is absurd." *Matter of State of N.Y. v. Shannon S.*, 20 N.Y.3d 99, 111 (2012) (Smith, J., dissenting).

FN5. I recognize that lay jurors presumably would consider Souza a "pedophile" within the far broader everyday use of that term. But that underscores the constitutional concerns raised by allowing experts to untether their opinions from the stricter definitions accepted by the medical community as to what constitutes a "mental abnormality."

The question remains whether the Commonwealth in fact offered sufficient proof that the victim of the 1971 crime was prepubescent. Although the DSM–IV notes the unremarkable fact that prepubescent children are "generally age 13 or younger," it of course does not define prepubescence in those terms. It does not follow, except through false logic, that someone who is thirteen or younger therefore must be prepubescent. Even if the judge credited the defense experts' definition of prepubes-

— N.E.3d —, 2015 WL 1214608 (Mass.App.Ct.)
(Cite as: 2015 WL 1214608 (Mass.App.Ct.))

cence (instead of leaving that question to the jury), her ruling does not depend on this. The overriding point is that the Commonwealth failed to offer the proof that its own experts' theory of Souza's alleged "mental abnormality" demanded. Finally, to the extent that the majority concludes that Souza's isolated references to the 1971 victim as "little" could constitute proof beyond a reasonable doubt that she was prepubescent, I disagree.

With the facts necessary to support the experts' diagnosis of pedophilia not having been put in evidence, the experts' opinion on that point cannot be used to avoid a directed verdict. See *LaFond v. Casey*, 43 Mass.App.Ct. 233, 237–238 (1997).[FN6] As we recently said, an expert opinion "premised on facts that [the expert] had gratuitously assumed and conjecture drawn from an insufficient evidentiary foundation ... [is] inherently flawed and legally incompetent." *Commonwealth v. Acosta*, 81 Mass.App.Ct. 836, 843 (2012).

FN6. See also *Patterson v. Liberty Mut. Ins. Co.*, 48 Mass.App.Ct. 586, 592–593 (2000), and cases cited (an expert's opinion must be "based solely on the expert's 'direct personal knowledge' or admissible evidence in the record and not on assumptions that are not established by such evidence").

To be sure, the Commonwealth's failure to establish that Souza was properly classified as a pedophile does not mean that it cannot prove that he is an SDP. The majority is correct that the case law makes clear that proof that someone suffers from "antisocial personally disorder" (APD) by itself can be "adequate to satisfy the definitional requirements of" being an SDP. *Commonwealth v. Reese*, 438 Mass. at 526 n. 9. In other words, where the Commonwealth has proven APD, there is no threshold requirement that it prove a second medical condition. However, it does not follow that a diagnosis of APD, without more, constitutes sufficient proof. This is especially true where, as here, the experts testified that it was the very combination of pedophilia and APD that caused the undue risk of sexual dangerousness (thus making proof of both prongs critical).

*11 A close examination of the Commonwealth's use of APD evidence here reveals why it did not amount to sufficient proof. To demonstrate that Souza currently suffers from APD, the Commonwealth's experts relied principally on his obstreperous behavior while confined at the treatment center. Granted, Souza's comportment during his decade of confinement was hardly exemplary. However, his documented violations of Massachusetts Treatment Center (treatment center) rules averaged only about two per year, and they mainly involved minor infractions such as trying to get medication at an incorrect time, "[f]ailure to stand for a [head] count, sleeping during a count, [and] things of that nature." Notably, none of Souza's violations of treatment center rules involved any inappropriate sexual behavior. Compare *Commonwealth v. Husband*, 82 Mass.App.Ct. at 5 ("Commonwealth experts testified that [sex offender's] personality disorder resulted in his inability to control his sexual impulses as evidenced by both the governing offenses and his extensive record of sexually aggressive and abusive conduct while incarcerated").

Moreover, as the trial judge cogently observed, even though proof that someone has APD may be sufficient to satisfy the statute's definitional requirements, this does not relieve the Commonwealth from having to prove that Souza currently has sexual compulsions on which his APD will induce him to act. Absent such proof, Souza cannot constitutionally be preventively detained. Passing over the question of whether there was adequate proof that Souza ever suffered from sexual compulsions that likely would cause him to reoffend,[FN7] evidence that he continued to have such compulsions at age sixty-nine was conspicuously absent. In fact, the Commonwealth did not present any evidence that Souza exhibited sexually inappropriate behavior of any kind since 1990.[FN8] In addition, the only objective test administered to Souza by the

— N.E.3d —, 2015 WL 1214608 (Mass.App.Ct.)
(Cite as: 2015 WL 1214608 (Mass.App.Ct.))

treatment center showed that he exhibited no clinically significant arousal to any of the sexual stimuli presented to him.[FN9]

FN7. This is not a case where the historical pattern of sex offenses itself demonstrated that the offender must have suffered from such compulsions.

FN8. Obviously, opportunities for sexual misbehavior may be more limited for someone who is confined, but they are hardly absent. Compare *Commonwealth v. Husband*, 82 Mass.App.Ct. at 2 (noting a sex offender's disciplinary record while incarcerated, in which "[h]is reported conduct toward prison female medical personnel included sexual epithets, insults, taunts, threats, exposure, and masturbation"). Moreover, as the evidence in this case revealed, sex offenders who target children sometimes exhibit sexually inappropriate behavior in confinement, such as hoarding pictures of children. There was even testimony about a pornography ring operating inside the treatment center; Souza was not implicated in any such activity.

FN9. Kelso discounted the results of the penile plethysmograph (PPG) test, even while acknowledging that respected empirical researchers had concluded that the best predictor of recidivism was sexual deviancy, as measured by PPG tests or other means. This is not to say that the reliability of PPGs has been established, and one of Souza's own experts stated that he does not put much stock in such tests. However, the fact remains that the one test that the treatment center itself administered to Souza to measure his response to sexual stimuli provided no evidence to support the Commonwealth's case and, if anything, undercut that case.

Nor do I believe the other factors the Commonwealth's experts relied upon supplied the missing proof. Both of the Commonwealth's experts emphasized Souza's refusal to admit his past sexual abuse of the two victims, something they asserted was a prerequisite to his being able to avoid reoffending. For example, in Tomich's view, Souza could not progress to the point that he safely could be released until he "squarely face[d] the reasons for his incarceration and for his civil commitment." Even to the extent Souza denied his offenses, [FN10] the import of that denial is, at a minimum, subject to significant doubt. The Commonwealth's lead expert acknowledged that a pre-eminent empirical study found no correlation between denial and recidivism. In the face of that study, the Commonwealth offered no empirical studies or evidence of a medical consensus to support its contrary position that denial is somehow a predictor of future offending.[FN11]

FN10. The uncontested facts belie any suggestion that Souza has accepted no responsibility for his two sex offenses. Indeed, Souza pleaded guilty to both offenses. In addition, even though his postplea accounts of the 1971 offense have varied somewhat, he has regularly admitted that he had intercourse with the 1971 victim while she was underage and that what he did was wrong. Granted, although Souza pleaded guilty to having indecently touched the 1990 victim, he denied sexually assaulting the boy in his postplea accounts. Souza was also indicted of rape of a child, something he consistently denied. The Commonwealth nol prossed the rape charge (after Souza's admitted that he touched the boy's penis), and it made no independent effort to substantiate that Souza had committed a rape. Nevertheless, the majority goes out of its way to highlight salacious details underlying the rape allegations even though the Commonwealth itself appropriately avoided the issue.

— N.E.3d —, 2015 WL 1214608 (Mass.App.Ct.)
(Cite as: 2015 WL 1214608 (Mass.App.Ct.))

FN11. I fully appreciate that the Legislature has made the opinions of QEs admissible in SDP trials regardless of whether they have been demonstrated to be reliable, and that this situation-specific modification of the rules of evidence has been upheld. See *Commonwealth v. Markvart*, 437 Mass. 331, 339 (2002), citing G.L. c. 123A, § 14(c). However, especially in light of the overlaying constitutional concerns that are implicated, I do not interpret such precedent as barring any judicial inquiry into whether the opinion of the QE enjoys a demonstrated medical foundation. That inquiry need not embroil a trial judge in making credibility determinations or "weighing" the evidence.

*12 More generally, the Commonwealth's experts insisted that the risks Souza presented to the community at large should be considered unacceptable until he has completed a treatment program at the treatment center. That view presupposes both that Souza presents unacceptable risks without treatment and that treatment would address such risks. Neither proposition is self-evident, and one searches in vain for evidence to support them here. [FN12] In fact, the evidence that was presented tended to undercut the Commonwealth's case. For example, the treatment center itself ruled out one form of treatment—behavioral conditioning—given Souza's nonresponsiveness to sexual stimuli as measured by the PPG test.[FN13] The experts' reliance on Souza's failure to complete a treatment program is particularly problematic in light of the undisputed fact that Souza has profound cognitive limitations that, at a minimum, make it difficult for him to complete a classroom course of study. [FN14] Cf. *Kansas v. Hendricks*, 521 U.S. at 389–393 (Breyer, J., dissenting) (Sex offenders cannot be civilly confined without being offered adequate treatment). In addition, it is undisputed that Souza's efforts to pursue sex offender treatment were interrupted when his participation was suspended as a disciplinary sanction for his not complying with treatment center rules. In other words, for acting out while he was involuntarily confined based on his allegedly not having received adequate treatment, the Commonwealth withheld the treatment that it considered necessary to allow his release.

FN12. The experts' stance on the need for treatment is better understood as a policy position than as evidentiary proof. That the experts would adopt such a position is consistent with the institutional roles that each played. Kelso was an employee of the private contractor that provided sex offender services at the treatment center, and Tomich was the director of forensic psychological services at the Department of Correction.

FN13. Kelso, the Commonwealth's lead expert, acknowledged that a preeminent empirical study demonstrated only a minor correlation between treatment and recidivism. Again, the existence of that study did not preclude the Commonwealth from proving that Souza's failure to complete a treatment program mattered, but, again, the Commonwealth offered no empirical studies or evidence of medical consensus to substantiate its position.

FN14. It is undisputed that Souza is of borderline intelligence, with an IQ measured between sixty-eight and seventy-one. Treatment center records show that he is able to read at a third-grade level. Kelso acknowledged that Souza's cognitive limitations presented potential obstacles to his succeeding in the treatment classes made available to him, and Tomich acknowledged that Souza's cognitive limitations meant that "it may take him longer to benefit from treatment." There was evidence that programs tailored for people with Souza's limitations were "sometimes offered" at the treatment center, that at least one treatment component was modi-

fied to address those limitations, and that he was able to pass that one (and a "few" classes overall).

Finally, I address the Commonwealth's one attempt to take on Souza's advanced age with empirically-based proof. Kelso relied in part on the "Static–99R" model, a widely-used tool that attempts to predict the degree of likelihood that a convicted sex offender will reoffend. As Kelso explained, the Static–99R model was specifically formulated to address the reduction in risk correlated with the aging process. However, a close examination of Kelso's use of the Static–99R model shows that it provides negligible support for his position that Souza remains an SDP. Kelso accepted that Souza had been married, and he acknowledged that his long-term relationship with his wife may well have lasted more than two years. Kelso also acknowledged that if this were so, then by Kelso's own calculations, Souza would score only a five on the Static–99R test, which would place him outside the category of offenders considered to be at a high risk to reoffend.[FN15] None of this is to say that a sex offender may be found to be an SDP only if he scores in the high risk category using the Static–99R model. My point is merely that Kelso's own reliance on empirically-based modeling undercut his claim that Souza was currently at a high risk to reoffend.

FN15. Kelso was able to score Souza that high only by crediting him with six 1971 sex crimes, even though five of the six New York charges were dropped, and there was no independent evidence presented in this trial that Souza had committed those crimes.

In sum, in my view, the trial judge applied appropriate scrutiny to the expert opinions that the Commonwealth offered and—finding them lacking in adequate foundational support—properly terminated the proceeding and ordered Souza's release. In the face of the Commonwealth's efforts to portray its case as adorned in the raiments of medical expertise, the trial judge dared to point out that "the emperor has no clothes."[FN16]

FN16. Because I consider a retrial unwarranted, I would not reach the Commonwealth's claim that the jury instructions were erroneous. I state no view on the merits of that issue except to note that while I agree with the majority that a narrow reading of *Johnstone, Petitioner*, 453 Mass. 544, 553 (2009), does not compel the instruction that the trial judge gave, that instruction does find some support in the reasoning on which *Johnstone* is based. Clarification from the Supreme Judicial Court on this point of law would be beneficial.

Mass.App.Ct.,2015.
In re Souza
— N.E.3d —, 2015 WL 1214608 (Mass.App.Ct.)

END OF DOCUMENT

COMMONWEALTH OF MASSACHUSETTS

PLYMOUTH, ss.
[Unified Session at Suffolk]

SUPERIOR COURT DEPARTMENT
OF THE TRIAL COURT
UNIFIED SESSION NO.
SUCR2011-10838(SDP)

JAMES GREEN,
Petitioner,

v.

COMMONWEALTH,
Respondent.

NOTICE OF APPEAL

The Commonwealth hereby appeals from the judgment, jury charge, jury verdict and certain rulings of the Superior Court including but not limited to the denial of the Commonwealth's motion for a new trial or, in the alternative, for a stay of discharge pending appeal.

Respectfully Submitted

By the Commonwealth

NANCY ANKERS WHITE
Special Assistant Attorney General

by: Mary P. Murray

Mary P. Murray, Supervising Counsel
Department of Correction
Massachusetts Treatment Center
30 Administration Road
Bridgewater, Massachusetts 02324
(508) 279-8184
BBO Number 555215
e-mail: mary.murray@massmail.state.ma.us

Dated: April 3, 2015

EXHIBIT 10

CERTIFICATE OF SERVICE

I hereby certify that I did this day serve a photocopy of the above document upon the petitioner to his counsel, Sondra Schmidt, by hand.

Dated: April 3, 2015

Mary P. Murray

Commonwealth of Massachusetts

INCARCERATED SEX OFFENDER REGISTRATION FORM

IMPORTANT – PLEASE READ CAREFULLY! Failure to fully complete, date, and sign this form places you in violation of MGL c. 6, §§ 178C-Q and may subject you to arrest and criminal prosecution. You are required to provide notice of any change of address to your residence(s), employment and institution(s) of higher education. Unclassified & Level 1 offenders must notify the Sex Offender Registry Board in writing not less than 10 days prior to the change of address. Level 2 & Level 3 offenders must appear in person at their local police department not less than 10 days prior to the change of address. You are further advised that you are required to immediately notify the appropriate authorities of any other state to which you relocate your residence(s), employment and attendance at an institution of higher education. Failing to notify of a change of address may subject you to arrest and criminal prosecution in this and any other jurisdiction.

Level	SON
3	23030

Last Name	First Name	Middle Name
Green	James	Curtis

Sex	Race	Hair Color	Eye Color	Height	Weight	Date of Birth	Place of Birth
M	B	Gray	Brown	5'	181		Georgia

Social Security Number or Alien ID Number	Scars, Marks, and Tattoos	Mother's Maiden Name
	NO	Mary J Cesp

Where You Will Reside Upon Release

If Homeless Check Here ☑ (Must register every 30 days)

Shelter name & Address or City/Town location where you are likely to be found: The Salvation Army Worcester Corps 35 Queen Street Worcester Ma 01610

Address Where You Will Reside Upon Release

Street Number	Street Name	Apartment or Bldg #

City/Town	County	State	ZIP Code	Tel. #

Mail Only Address (If different from residential address or are Homeless):

Secondary or Additional Addresses (14 days per year or 4 days per month)

Street Number	Street Name	P.O. Box	Apartment or Bldg #

City/Town	County	State	ZIP Code	Tel. #

Employment or Work Address

Street Number	Street Name

City/Town	County	State

Occupation	Name of Company o

EXHIBIT 11

School, Vocational Training Program, or other Professional Training Program currently or planning to be enrolled in:

Institution of Higher Learning

Street Number	Street Name	Do you live on campus ☐ YES ☐ NO

City/Town	County	State	ZIP Code	Tel. #

I understand that I am in violation of my registration duty if I fail to notify, as described above, of any change of address to my residence(s), employment and institution(s) of higher education. I certify that I am the above-named person and that the information provided herein is true and accurate.

Signed, under the pains and penalties of perjury,

this 20 day of March

in the year 2015.

James Curtis Green

Offender Signature:

Name of Release Facility: MASSACHUSETTS TREATMENT CENTER

Inmate ID #	Date of Release
M-106022	

Witnessing Official Name	Title
LOCKSLEY WILSON	BPO B

Signature	Telephone #
Locksley Wilson	508-279-8159

SOR Form 001-I (3/11)

COMMONWEALTH OF MASSACHUSETTS
UNIFIED SESSION, ss. SUPERIOR COURT DEPARTMENT
OF THE TRIAL COURT
DOCKET NO. 2011-10838

JAMES GREEN,
Petitioner

v.

COMMONWEALTH OF MASSACHUSETTS,
Respondent

Further Production of Documentation Requested by the Court Pertaining to Petitioner Release

In accordance with the Court's request for written documentation pertaining to release plans, Petitioner's counsel provides the following information:

1. Housing. Petitioner will be residing at the New England Shelter for Homeless Veterans (NECHV), in Boston. A letter from the shelter is appended (confirming that a bed is being held for him, that he can reside at the shelter for two years (assuming he abides by the rules of the facility), and that G.P.S. and sex offender status would pose no problems for him).[1] Information about the services at NECHV has previously been provided.

2. Order for Probation. Appended as requested by the Court.

Respectfully submitted,
By Counsel,

EXHIBIT 12

[1] Commonwealth counsel objected to the previously submitted letter in that it was unsigned. The author of that originally-produced letter was not available to sign, so the Admissions/Discharge Coordinator, Mark A. Blanchette, signed a reprinted copy of the letter. Petitioner's counsel subsequently noticed that the reprinted letter was addressed to another party, and asked Mr. Blanchette to revise it whereupon the attached copy was faxed to Petitioner's counsel. Both copies are appended in the event that Commonwealth counsel may object that the signature on the proper letter is not an original.

Sondra H. Schmidt
BBO #551957
726 Jerusalem Road
Cohasset, MA 02025
Telephone: 781-383-1245

Dated: March 25, 2015

Certification: As an officer of the Court, I certify that the information presented in this production of documents is true and accurate to the best of my knowledge and belief.

Sondra Schmidt

Certificate of Service

On this 25th day of March, 2015, I, undersigned counsel for James Green, hereby certify that I serviced notice of the within document and attendant enclosures upon counsel of record by causing a true and exact copy of the same to be sent via facsimile transmission to Attorneys Sabine Coyne and Mary Murray.

Sondra Schmidt

MASSACHUSETTS TRIAL COURT
OFFICE OF THE COMMISSIONER OF PROBATION
ONE ASHBURTON PLACE
BOSTON, MA 02108-1612

EDWARD J. DOLAN
COMMISSIONER

Tel (617) 727-5300
Fax: (617) 727-5333

TO: Mary P. Murray, TC Supervising Counsel, DOC (508) 279-8181
Sondra Schmidt, Counsel for James Green (781) 383-8765

FROM: Crispin Birnbaum, General Counsel

DIV/UNIT: Legal Unit

PHONE #: (617) 727-5300 Ext. FAX: 617-367-0657

OF PAGES INCLUDING COVER SHEET

TIME: DATE: April 2, 2015

COMMENTS :

EXHIBIT 13

MASSACHUSETTS TRIAL COURT
OFFICE OF THE COMMISSIONER OF PROBATION
ONE ASHBURTON PLACE
BOSTON, MA 02108-1612

EDWARD J. DOLAN
COMMISSIONER

TEL: (617) 727-5300
FAX: (617) 727-5373

April 2, 2015

Assistant Clerk Kristen Zitano
Session Clerk, Unified SDP Session – Courtroom 914
Suffolk Superior Court Department
Three Pemberton Square
Boston, MA. 02108

RE: James Green v. Commonwealth
SUCR2011-10838

Dear Assistant Clerk Zitano:

On behalf of the Massachusetts Probation Service, please accept originals of the following documents:

1. Probation's Written Statement upon Request of the Court; and
2. Certificate of Service upon the parties.

Probation appreciates the Court's willingness to provide Probation with an opportunity to be heard on the issue of supervision and conditions of release to the community.

Probation understands that the Court has scheduled a hearing for tomorrow, Friday, April 3, 2015 at 10:00 am on the Commonwealth's Motion for a Stay. If the Court wishes Probation to attend the hearing or wishes any further involvement by Probation in this matter, please call me at the number below. Thank you in advance for your assistance.

Sincerely,

Crispin Birnbaum
General Counsel

cc: Mary Murray, Esq. for DOC
Sondra Schmidt, Esq. for Mr. Green

COMMONWEALTH OF MASSACHUSETTS

UNIFIED SESSION at Suffolk

SUPERIOR COURT DEPARTMENT
SU-CR-2011-10838

JAMES GREEN

v.

COMMONWEALTH OF MASSACHUSETTS

PROBATION'S WRITTEN STATEMENT UPON REQUEST OF THE COURT

Now comes the Massachusetts Probation Service ("Probation") offering a written statement in response to the Court's request for comment on possible conditions of release in the above-referenced G.L. c. 123A, §9 case.[1] After a jury verdict that Mr. Green is no longer sexually dangerous, the Court contemplates releasing Mr. Green to the community with probation supervision and an Order of Conditions such as GPS monitoring, no use of non-prescription drugs or alcohol, random testing by Probation, no contact with victims, and no travel outside Massachusetts.

Probation respectfully disagrees that any Order of Release or Order of Conditions can include Probation supervision, monitoring or testing, as there is no legal authority to so order. Probation reaches this position for the following legal and practical reasons:

1. Proceedings pursuant to the Sexually Dangerous Persons ("SDP") statute, G.L. c. 123A, are civil in nature. *Commonwealth v. Dutil*, 437 Mass. 9, 20 (2002), *Commonwealth v. Bruno*, 432 Mass. 489, 500 (2000);

2. The authority of the court to place someone under pre-trial or post-dispositional probation supervision, including with conditions, is limited to those individuals before the court in criminal or juvenile sessions facing "an offense or a crime". G.L. c. 276, §87, 87A (adult) and G.L. c. 119, §58 (juvenile);

3. Probation has found no other statutory or case law authority to allow the court to order Probation's involvement, most especially in civil cases;

[1] By submitting a written statement to the Court, Probation does not waive its argument regarding lack of jurisdiction and authority for it to act. Further, Probation takes no position with respect to whether Mr. Green should have been found to be SDP or should be released, the merits of any pending motion or appeal, or any other substantive issue in his SDP case. Probation does not make any argument for or against the Department of Correction or Mr. Green but merely offers its own perspective on release conditions and supervision to assist the Court, upon its request. Probation is not moving to intervene.

4. The SDP statute does not provide the court with authority to release an individual, who has been found no longer to be a SDP, into the community with conditions of release, monitoring, testing or supervision by Probation. G.L. c. 123 §9. Rather, the statute requires merely a release, as follows:

> Unless the trier of fact finds that such person remains a sexually dangerous person, it shall order such person to be discharged from the treatment center. Upon such discharge, notice shall be given to . . . [various entities] . . .

Id. It also should be noted that the statute does not specify that these individuals be subject to community monitoring by the Department of Corrections ("DOC") and/or the Treatment Center, even though these entities previously had jurisdiction over the individual during the SDP commitment;

5. The fact that the docket number in Mr. Green's case contains "CR" rather than "CV" does not assist the court. Probation understands that a historic backlog of cases pursuant to G.L. c. 123A, §9 caused the creation of the Unified Session and efforts to reduce the backlog. How a Clerk chooses to docket a case or how the Clerk's electronic docketing system is coded does not determine the Court's jurisdiction over the matter.

   SDP cases in the Unified Session are civil proceedings under the law. Further evidence of this fact is the structural framework of the SDP process. District Attorneys or the Attorney General file a "petition", not a complaint, alleging that the person is SDP. G.L. c. 123 §12. The Court commits someone who is SDP to the Treatment Center, rather than pronouncing a criminal sentence of incarceration. Likewise, under G.L. c. 123A §9, a person committed to the Treatment Center is entitled to file a "petition" for examination and discharge. The nature of the SDP commitment of a day to life for treatment is analogous to other civil commitments for mental health treatment under Chapter 123. There is no authority to release an individual from a Chapter 123 commitment to be supervised by Probation;

6. It is unclear from the Court's request for Probation's input what legal authority it may rely on for an order of probation supervision and conditions. The Court is silent on this;

7. Probation has become aware of two other SDP cases which have been referenced as "precedent" for a proposed release of Mr. Green into the community with conditions of release and under the supervision of Probation. Probation addresses each below:

   a. *Commonwealth v. Gould*, Plymouth C.A. No. 01-00719
   This case does not serve as proper legal foundation for a proposed community supervision order for Mr. Green as Mr. Gould was subject to a term of "from and after" probation supervision in his underlying criminal case. The "from and after" involvement by Probation was to begin at the time of Mr. Gould's release from custody. Probation was required in the criminal case to supervise Mr. Gould upon his release, regardless of the outcome of his SDP case.

The SDP judge, Sanders, J., relied in 2005 on the case of *Buckley v. Quincy District Ct.*, 395 Mass. 815, 817 (1985) for the proposition that the SDP judge could modify the original "from and after" probation order and extend it due to "changed circumstances", even if Gould objected, which he did not. Probation respectfully disagrees with the court's interpretation of *Buckley*, as the legal question in that case was the authority of one District Court to amend the order of another District Court, both sitting as criminal sessions. The *Buckley* Court found that, yes, an existing order of probation in that situation can be modified for meritorious changed circumstances. *Id.* The judge on the Gould case was sitting in the SDP session, not sitting as a judge in the criminal session, where the court would have been authorized to extend the probation order under the right changed circumstances. Whether the court was correct in its extension of Mr. Gould's probation or not, Probation nevertheless had jurisdiction to intrude in Mr. Gould's life through the criminal court's order; and

b. *Commonwealth v. Souza*, Unified Session 2009-10091
This SDP case with an ongoing order of probation supervision with conditions should not assist the court. In 2013, the SDP judge, Kottmyer, J. ordered probation supervision with ten conditions for Mr. Souza upon his release from the Treatment Center. Similar to Mr. Green, the court released Mr. Souza after a no longer SDP finding, pending an appeal by the Commonwealth. Probation accepted the signed order of the court and complied with it without questioning it. Upon recent review of the Souza order by the Probation Legal Unit, Probation will file a Motion to Reconsider the Order for lack of jurisdiction. Probation will use as its grounds those mentioned above and explained in further detail below;

8. If this court follows the Souza model and signs an order involving Probation in Mr. Green's life in the community, Probation lacks any legal authority to act in the normal course of its business. A non-exhaustive list with several examples follows:

a. If Mr. Green were to exhibit conduct which violated the court's detailed order, Probation would be unable to issue a warrant or arrest him, as he is a civilly-involved individual. G.L. c. 279, §3. Probation lacks any valid means or authority to bring Mr. Green before the court for a violation;

b. There is no existing process for a violation of probation or a violation of conditions of release for Probation and the Court to follow for a civilly-involved individual. Even if there was a violation process, there is no authority for the Court to recommit Mr. Green upon a violation of probation (as opposed to an arrest on a new crime) or issue a *mittimus* or *habe* for his return court appearance. No correctional institution would take custody of him without such documentation;

c. Placing Mr. Green on supervision in the community does not guarantee his next court appearance should the Commonwealth's appeal prove successful. Monitoring someone on GPS and instructing them to avoid certain persons or exclusion zones does not prevent flight or prevent misconduct; and

d. There is no type of probation supervision fee for the Court to impose upon Mr. Green as a civilly-involved individual and for Probation to monitor or the Clerk to collect. Existing law requires that the court "*shall* assess upon every person placed on supervised probation" a monthly fee or community service in lieu thereof in cases of "undue hardship" after a hearing and findings. G.L. c. 276, §87A (emphasis added). The Office of the State Auditor has conducted numerous audits of the Trial Court regarding the enforcement of this provision;

9. On a lesser but still practical level, Probation is unable to enter Mr. Green as a supervision case in any electronic system to track his progress and compliance. Even if Probation maintained a paper record of all supervision notes and violations, civilly-involved individuals cannot be combined with Probation's regular caseload for outcome measures, data collection, supervision standards, and oversight of its employee standards of performance;

10. The fact that Probation did not understand that it could challenge the Souza supervision order in 2013 during a time of internal transition does not render it a lawful order. Using the Souza order to craft a new order of supervision and conditions only repeats a mistake and compounds a problem for all system participants;

11. The fact that Probation has done its best to supervise Mr. Souza for the court and would have the capacity to supervise Mr. Green under the Court's order if Mr. Green was a convicted criminal defendant does not shed any light here. If a court order is not supported by proper legal authority then Probation has no jurisdiction to act and questions its and the Trial Court's exposure to liability were it to act;

12. Probation has the same interest as the Court in protecting the public and providing treatment when indicated. Probation works closely as an agent of the court on all similar criminal or juvenile orders. Unfortunately, Probation cannot serve these interests without proper legal jurisdiction and authority to do so;

13. Mr. Green's understandable desire to obtain release from the Treatment Center after his success at trial and his related agreeability to accept any conditions of release are not grounds for a court order without legal foundation; and

14. Examination of Mr. Green's prior record reveals no order of "from and after" probation supervision, as in the Gould case. Probation believes the Souza order is unlawful. The SDP statute provides no legal basis for an order of conditions of release or supervision. Probation, therefore, has no jurisdiction to monitor or impose limitations on Mr. Green were they to be ordered.

CONCLUSION

Probation appreciates the opportunity to be heard and offer this written statement prior to the Court issuing its order. For the foregoing reasons, however, Probation respectfully recommends removal from any order of release any direct or indirect reference to Probation being involved with Mr. Green.

RESPECTFULLY SUBMITTED,
FOR THE PROBATION SERVICE
of the Commonwealth of Massachusetts

BY ITS ATTORNEY
Maura Healey

Crispin Bimbaum BBO No. 545595
Natalie Lorenti BBO No. 662509
Special Assistant Attorneys General
Massachusetts Probation Service
One Ashburton Place, 4th floor
Boston, MA. 02108
(617) 727-5300

April 2, 2015

CERTIFICATE OF SERVICE

This 2nd day of April, 2015, the Massachusetts Probation Service served a copy of this pleading by facsimile upon the parties: the attorney for Mr. Green, Sondra Schmidt of Cohasset, MA. and the attorney for the Department of Correction, Mary Murray at the Treatment Center.

Crispin Bimbaum, SAAG

COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT

98-J-283

FREDERICK WYATT

vs.

COMMONWEALTH OF MASSACHUSETTS.

ORDER

The Commonwealth has raised an issue worthy of appellate review. See, e.g., Hill, petitioner, 422 Mass. 147 (1996). Compare Andrews, petitioner, 368 Mass. 468, 489-490 (1979).

Accordingly, it is ORDERED that the Order for Discharge entered April 8, 1998, in the Superior Court (Docket No. 97-229-Unified Session at Suffolk), be, and the same hereby is, STAYED pending appeal or until further order of this court or a single justice thereof.

The parties shall proceed according to the following schedule:

The Commonwealth is to file a notice of appeal forthwith if it has not already done so. The appeal is entered this date as A.C. 98-P-805. The necessity for assembly of the record is waived. The Hampden County Clerk for the Superior Court is to forthwith transmit two attested copies of the docket sheet in this matter. All further filings in this matter will be under case No. A.C. 98-P-805.

The Commonwealth is to file and serve its brief and appendix

EXHIBIT 14

on or before May 20, 1998. The petitioner shall file and serve his brief on or before June 10, 1998. The matter is placed on the June 1998 list for oral argument. No enlargements or continuances will be granted, nor should any be sought.

By the Court (Brown, J.)

Ashley Ahearn

Clerk

Entered: April 22, 1998

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss. SUPREME JUDICIAL COURT
FOR SUFFOLK COUNTY
No. 98-248

COMMONWEALTH

vs.

FREDERICK WYATT.

MEMORANDUM AND ORDER

The defendant has filed a petition pursuant to G. L. c. 211, § 3, seeking his discharge from the Massachusetts Treatment Center in view of a verdict by a jury in the Superior Court that he is no longer a sexually dangerous person. The trial judge entered an order that the defendant be discharged. A single justice of the Appeals Court, on the Commonwealth's application under G. L. c. 231, § 118, first para., stayed the order of the trial judge and expedited the Commonwealth's appeal to a panel of the Appeals Court. I have examined the papers in the case and considered the arguments of counsel.

The Commonwealth clearly has the right to appeal from the order of discharge predicated on the jury verdict and from any order denying its post-trial

EXHIBIT 15

motions. The Commonwealth's issues on appeal, particularly those pertaining to the jury instructions, including the instruction that the defendant "starts this trial presumed, as a matter of law, not to be a sexually dangerous person," raise matters worthy of presentation to an appellate court. The Commonwealth has also demonstrated that the defendant poses a danger to the public if discharged pending full appellate review of the trial, and, additionally, that there is a risk of loss of jurisdiction if the order entered in the Appeals Court is vacated. I expect that, as ordered by the single justice of the Appeals Court, the appeal will be considered by a panel of that Court on an expedited basis in June.

The relief requested by the defendant is denied.

By the Court (Greaney, J.)

Entered May 15, 1998 Assistant Clerk

Westlaw.
989 N.E.2d 557
83 Mass.App.Ct. 1137, 989 N.E.2d 557, 2013 WL 3064445 (Mass.App.Ct.)
(Table, Text in WESTLAW), Unpublished Disposition
(Cite as: 83 Mass.App.Ct. 1137, 2013 WL 3064445 (Mass.App.Ct.))

NOTICE: THIS IS AN UNPUBLISHED OPINION.

Appeals Court of Massachusetts.
John YOUNG, petitioner.

No. 11-P-956.
June 20, 2013.

By the Court (VUONO, RUBIN & SULLIVAN, JJ.).

MEMORANDUM AND ORDER PURSUANT TO RULE 1:28

*1 This case comes to us in the same procedural posture as *McIntire, petitioner*, 458 Mass. 257 (2010), cert. denied, 131 S.Ct. 2909 (2011) (*McIntire*). During the pendency of this appeal, the petitioner has pursued relief in another petition under G.L. c. 123A, § 9. Following trial on that petition, he was found sexually dangerous, and that judgment is now separately on appeal. We decline, however, the Commonwealth's request to dismiss this appeal. *McIntire* did not dismiss the appeal there before the court, but rather held only that in these circumstances a petitioner successful in his appeal would not be "entitled to an order of discharge from the treatment center at this time." 458 Mass. at 266. The court in *McIntire* nonetheless addressed the merits of the appeal before it—indeed, after finding the petitioner's appeal had merit, it reversed the order below—and we follow the same procedure here.

We turn then to the merits. The petitioner in this case involving a petition for discharge from the Massachusetts Treatment Center pursuant to G.L. c. 123A, § 9, argues first that the Commonwealth was relieved of its burden to prove its case beyond a reasonable doubt by two of the judge's instructions. This claim was waived as there was no objection; "accordingly, we review for a substantial risk of a miscarriage of justice." *Commonwealth v. Walker*, 83 Mass.App.Ct. 901, 903 (2013). We first address the petitioner's argument that the judge's general instruction on proof beyond a reasonable doubt acted to lessen the burden of proof. In that instruction, the judge said, "proof beyond a reasonable doubt, that's a term that we all use, probably pretty well understood but it's not easily defined. It doesn't mean proof beyond all doubt. It doesn't mean proof beyond some fanciful or imaginary doubt. It doesn't mean beyond some possible doubt. Doesn't mean proof to a mathematical certainty. It doesn't mean proof beyond a shadow of a doubt. That's Alfred Hitchcock stuff." The judge went on to say, "[W]hat it means is this: that something is proved beyond a reasonable doubt, if after you've considered and compared all the evidence, you have in your minds a conviction to a moral certainty that the matter is true. A moral certainty, that means a subjective state of near certitude. Certitude is the state or the feeling of certainty."

While instructions emphasizing all the types of doubt that are not "reasonable doubt" might in some circumstances create a risk that the jury will understand the burden upon the Commonwealth to be less than it actually is, our courts have rejected challenges to burden-of-proof instructions containing each of the phrases used by the judge. See, e.g., *Commonwealth v. Webster*, 5 Cush. 295, 320 (1850) ("imaginary doubt"); *Commonwealth v. Watkins*, 433 Mass. 539, 547 n. 6 (2001) ("beyond all doubt"); *Commonwealth v. Schand*, 420 Mass. 783, 794 & n. 10 (1995) (same, and "fanciful doubt"); *Commonwealth v. Painten*, 429 Mass. 536, 545 (1999) ("all possible doubt"); *Commonwealth v. Mack*, 423 Mass. 288, 290-291 & n. 5 (1996) ("mathematical certainty"); *Commonwealth v. Denis*, 442 Mass. 617, 622 (2004) ("shadow of a doubt"); *Commonwealth v. Richardson*, 425 Mass. 765, 768 (1997) (same). The Supreme Judicial Court has held that contrasting "beyond a shadow of a doubt" with "beyond a reasonable doubt" is

EXHIBIT 16

"unlikely to be helpful to a jury," *Commonwealth v. Richardson, supra,* and we think that the reference to the former phrase being a Hollywood invention, too, might at least in some circumstances also tend to confuse the jury or weaken the burden of proof instruction. In this case, however, reading the jury charge as a whole, and particularly in light of the language that immediately follows the litany, which is quoted above, we do not think that a reasonable juror could have used the instruction incorrectly to require proof less than proof beyond a reasonable doubt. In the absence of error, there can be no substantial risk of a miscarriage of justice.

*2 The judge also gave an instruction, challenged by the petitioner, that "[n]ow you have heard the two qualified examiners and you will evaluate their testimony just the way you evaluate everybody else's testimony. If you decide that you don't give any weight whatsoever to the testimony of both of them, then you may not find Mr. Young sexually dangerous. In other words, you needn't find beyond a reasonable doubt on the testimony of one, but if you have no credibility—if neither of the witnesses—of the qualified examiners has any credibility in your collected minds, you may not find Mr. Young sexually dangerous on the basis of other evidence in the case. You don't have to believe either one of them beyond a reasonable doubt. You can use the other evidence in the case to corroborate their testimony, but if you don't believe them at all, either one of them, the two of them, then you may not find him sexually dangerous."

The petitioner argues that *Johnstone, petitioner,* 453 Mass. 544 (2009) (*Johnstone*), means that the qualified examiner (QE) testimony must, by itself, suffice to prove to the jury's satisfaction beyond a reasonable doubt that the petitioner is sexually dangerous. *Johnstone* does not by its terms address the degree to which a jury must credit the testimony at trial of a QE before they may find someone a sexually dangerous person, and we are not persuaded by the petitioner's argument. Indeed, the petitioner's position is in at least some tension with those aspects of *Johnstone* and the statute that appear to envision a place for additional evidence of sexual dangerousness at trial. See *Johnstone,* 453 Mass. at 553. While the phrasing of this portion of the instruction is a bit complex, we are not persuaded that any error it might contain created a substantial risk of a miscarriage of justice.

The petitioner also argues that the last sentence quoted above—"if you don't believe them at all, either one of them, the two of them, then you may not find him sexually dangerous "—would have been understood to mean that only in the absence of any belief in either QE were the jury permitted to render a verdict that the Commonwealth had not proven the petitioner sexually dangerous. We disagree. Read in context, it would not have been understood to suggest that this was the only circumstance in which a finding in favor of the petitioner was permissible. The petitioner again has not demonstrated a substantial risk of a miscarriage of justice.

Finally, the petitioner also argues that the Commonwealth's evidence failed to establish that his mental condition resulted in a general lack of power to control his sexual impulses. This same question was litigated before this court in a prior appeal from an earlier decision involving the same petitioner, see *Commonwealth v. Young,* 66 Mass.App.Ct. 1103 (2006). While we are not bound in this case by that decision, we are not persuaded that its reasoning is in error. Where there was evidence that the petitioner suffered from antisocial personality disorder, and that, as a result of that disorder, he committed not only the sexual offenses at issue here, but also engaged in other wrongful, uncharged sex-related conduct (for example, making obscene phone calls, including one in which he forced a woman to engage in sexual activity alone in her home on threat of doing violence to her husband), we think that there was sufficient evidence to support a finding beyond a reasonable doubt that the petitioner has a personality disorder that causes a general lack of power to control sexual impulses.

See G.L. c. 123A, § 1.

*3 *Judgment affirmed.*

Mass.App.Ct.,2013.
In re Young
83 Mass.App.Ct. 1137, 989 N.E.2d 557, 2013 WL 3064445 (Mass.App.Ct.)

END OF DOCUMENT

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

APPEALS COURT
SINGLE JUSTICE
2015-J-0133

IN RE JAMES GREEN

PETITIONER'S OPPOSITION TO COMMONWEALTH'S MOTION TO STAY PENDING APPEAL

Now comes the Petitioner and respectfully opposes any stay of his release. In support, the Petitioner states the following:

1. A jury has found the Petitioner not sexually dangerous. Deference should be given to the jury's verdict. Segal v. Gilbert Color Systems, Inc., 746 F.2d 78 (1st Cir. 1984).
2. Given the jury's verdict, substantive due process dictates that the Petitioner should be released. Commonwealth v. Travis, 372 Mass. 238, 247-248 (1977)
3. There is a reasonable likelihood that the Commonwealth's appeal will NOT succeed. The Commonwealth complains of the trial court's CAB instruction, found to be "ill advised" in George Souza, *petitioner*, 87 Mass. App. Ct. 162 (2015). The trial court (Pierce, J.) considered the claimed error in its April 3, 2015 written order. The trial court found that even if the instruction was in error, "it was unlikely to have affected the jury's verdict." Id. Whether there has been any error at all is still an open issue since the Application for Further Appellate Review in Souza, supra is yet to be decided.
4. The Petitioner submits the claim, that the trial court cannot order the Petitioner released with "appropriate conditions," appears to be inconsistent with the Supreme Judicial Court's order in Commonwealth v. Parra, 445 Mass. 262, fn. 5

(2005). In that case's docket, entry # 9, the Supreme Judicial Court entered the following Order,

> The respondent shall be released pending the outcome of this appeal, or until further order of this Court, on appropriate conditions to be determined, after hearing, by a judge in the Superior Court.

5. I addition to the order for "appropriate conditions" in Parra, supra, it should be noted that same order was made by the trial court in George Souza, *petitioner,* 87 Mass. App. Ct. 162 (2015). The trial court order in Souza, supra was then affirmed by the Single Justice of this Court in Souza v. Commonwealth, 2013-J-0234 (Rubin, J.) and by Justice Duffly as the Supreme Judicial Court Single Justice in Souza v. Commonwealth, SJ-2013-0230. It would be remarkable if all three Justices were mistaken.

6. The Petitioner submits the more reasonable course here is to deny the Commonwealth's motion to stay the Petitioner's release and to instead order his release with whatever "appropriate conditions," the Court determines.

/s/ Michael Nam-Krane
Michael A. Nam-Krane
BBO# 636003
PO BOX 301218
Boston, MA 02130
Phone: 617.553.2366
Fax: 617.344.3099
michael@bostonjustice.net

CERTIFICATE OF SERVICE

I, Michael A. Nam-Krane, hereby certify that I have served a copy of the foregoing pleading today by email to opposing counsel.

/s/ Michael Nam-Krane
Michael A. Nam-Krane

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

APPEALS COURT
SINGLE JUSTICE NO.

SUPERIOR COURT DEPARTMENT
UNIFIED SESSION
SUCR2011-10838

IN RE JAMES GREEN

AFFIDAVIT IN SUPPORT OF PETITIONER'S OPPOSITION TO COMMONWEALTH'S MOTION TO STAY PENDING APPEAL

I, Michael A. Nam-Krane, depose and state as follows:

1. I am counsel for the petitioner in the above captioned case.

2. The Commonwealth is appealing the jury verdict, finding the Petitioner no longer sexually dangerous.

3. The trial court (Pierce, J.) considered the claimed error in it's April 3, 2015 written order.

4. The trial court found that even if the instruction was in error,, "it was unlikely to have affected the jury's verdict."

5. I have attached the trial court's written order.

6. In the docket of Commonwealth v. Parra, 445 Mass. 262 (2005), entry # 9, the Supreme Judicial Court (SJC-09552) entered the following Order,

> The respondent shall be released pending the outcome of this appeal, or until further order of this Court, on appropriate conditions to be determined, after hearing, by a judge in the Superior Court.

The foregoing is true to the best of my knowledge and belief. Signed under the pains and penalties of perjury.

/s/ Michael Nam-Krane
Michael A. Nam-Krane

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

APPEALS COURT
SINGLE JUSTICE
2015-J-0133

IN RE JAMES GREEN

NOTICE OF APPEAL

Notice is hereby given that the Petitioner, being aggrieved by certain opinions, rulings, directions and judgments of the Court, including but not limited to the April 8, 2015 Order, staying his release hereby appeals pursuant to Mass.R.App.P. 3, 4 & 6.

/s/ Michael Nam-Krane
Michael A. Nam-Krane
BBO# 636003
PO BOX 301218
Boston, MA 02130
Phone: 617.553.2366
Fax: 617.344.3099
michael@bostonjustice.net

CERTIFICATE OF SERVICE

I, Michael A. Nam-Krane, hereby certify that I have served a copy of the foregoing pleading today by email to opposing counsel.

/s/ Michael Nam-Krane
Michael A. Nam-Krane